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No. 635.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

JACOB FROHWERK, PLAINTIFF IN ERROR,

VS.

THE UNITED STATES OF AMERICA,
DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

FRANS E. LINDQUIST,
Attorney for Plaintiff in Error.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

April 23, 1918, the Grand Jurors of the United States within and for the Western Division of the Western District of Missouri, returned into the District Court of the United States for the Western Division of the Western District of Missouri, a certain indictment, in thirteen counts, against CARL GLEESER and JACOB FROHWERK, as defendants.

The first count of the indictment attempts to charge said defendants with conspiracy to violate Section 4 of the Act of June 15, 1917, commonly known as the Espionage Act. The remaining twelve counts attempt to charge certain violations of Section 3 of said Act.

MR. GLEESER, at the times mentioned in said indictment, was the owner, editor and publisher of the *Missouri Staats Zeitung*, a weekly newspaper printed and published at Kansas City, Missouri. MR. FROHWERK was employed by Mr. GLEESER as editorial writer, at ten dollars per week. MR. FROHWERK submitted all of his writings to MR. GLEESER, who accepted, corrected or rejected them. For convenience we will hereafter refer to MR. FROHWERK as the defendant.

April 23, 1918, the defendant filed his demurrer to said indictment.

The Honorable ARBA S. VAN VALKENBURGH, Judge of the said United States District Court, having been disqualified, the Honorable WALTER H. SANBORN, Senior Judge of the United States Circuit Court of Appeals for the Eighth Circuit, designated the Honorable FRANK A. YOUMANS, Judge of the District Court of the United States for the Western District of Arkansas, to try said cause, and to have and exercise the same powers that were vested in the said Judge VAN VALKENBURGH prior to such disqualifications.

June 4, 1918, the Honorable FRANK A. YOUMANS, Judge by assignment as aforesaid, ordered that

the Clerk of said District Court and the jury commissioner for the Western District of Missouri should proceed forthwith to draw the names of forty qualified persons, residents and citizens of the Western Division of the Western District of Missouri, to appear in said District Court, on the 25 day of June, 1918, at nine o'clock A. M., to serve as petit jurors, for the year 1918.

June 24, 1918, said Demurrer was by the District Court overruled, the defendant excepting.

The defendant thereupon filed a Motion to Dismiss the Indictment, which motion was also overruled, the defendant excepting.

The government was represented by FRANCIS M. WILSON, Esq., United States Attorney. The defendant appeared in person, and by JOSEPH D. SHEWALTER, Esq., his attorney.

June 25, 1918, the defendant filed his motion to quash the jury panel, which motion was by the court overruled, the defendant excepting.

The defendant thereupon filed his verified Application for a Continuance, which application was by the court overruled, the defendant excepting.

The defendant thereupon stood mute and refused to plead. Whereupon a plea of not guilty as to each count of said indictment was entered, by order of the court. A jury was thereupon selected and sworn to try said cause. The Government, to sustain the said charges, examined the following witnesses, to-wit: J. A. Calvin, W. N. Grant, C. H. Galaskowey, Frank Cramer, Arthur

Bagley and Otto Schmitz, and thereupon rested its case. The defendant thereupon demurred to said evidence, and asked for a peremptory instruction to find him not guilty, all of which were refused, the defendant excepting. Jacob Frohwerk, J. B. Hipple, Lina Binder, A. J. Hoffman, John West and John Fairweather testified on the part of the defendant. Whereupon Carl Gleeser (indicted jointly with this defendant, who had previously pleaded guilty to the charges contained in said indictment, and had been sentenced to imprisonment in the United States Penitentiary, at Leavenworth, Kansas), testified in rebuttal for the Government, and the case was closed. Thereupon the court gave its instructions, to which defendant specially excepted, pointing out the errors in such instructions in particular, and the defendant also asked the court to give certain instructions, all of which were denied, the defendant excepting.

June 28, 1918, said cause was argued and submitted to the jury. Thereafter the jury returned a verdict of guilty upon the first, second, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth and thirteenth counts, and not guilty upon the seventh count, of said indictment. Whereupon, the defendant was duly sentenced, upon the first count of said indictment, to imprisonment in the United States Penitentiary, at Leavenworth, Kansas, for a period of ten years, and to pay a fine of $500.00, and also sentenced to imprisonment for a like period upon each of the second, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth and thirteenth

counts of said indictment, to run concurrently with the sentence imposed on the first count thereof.

July 1, 1918, a Writ of Error was duly issued from this Honorable Court, and a Citation issued served and filed. The defendant was thereupon granted leave to file a bill of exceptions on or before September 1, 1918, and subsequently the time was entended to September 20, 1918.

August 7, 1918, said defendant caused to be transmitted and submitted to said United States Attorney, for his approval, a bill of exceptions in accordance with Rule 4 of this Honorable Court, which said United States Attorney refused to approve.

August 20, 1918, said proposed bill of exceptions was submitted to the Honorable FRANK A. YOUMANS, judge by assignment as aforesaid, with a request that he settle, seal and file the same, which the said judge then and there refused to do, for the alleged reason that as the matters therein set out do not appear of record in this cause, and because the bill of exceptions prepared and tendered by the defendant is incorrect, incomplete and not susceptible of amendment.

That in lieu of said proposed bill of exceptions, the said judge did prepare, sign and seal another pretended bill of exceptions, in which the only reference to the actual trial and evidence introduced on the part of the government, are the following, to-wit:

"Thereupon a jury was called and duly sworn and empaneled to try the case of the United States against Jacob Frohwerk.

On the trial of said cause the United States introduced testimony tending to prove all of the allegations in counts 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12 and 13 of the indictment."

That JOSEPH D. SHEWALTER, attorney for said defendant, refused to accept said bill of exceptions, and the same has never been filed and made a part of the record in this cause.

December 9, 1918, said defendant, through his present attorney, appeared in this Honorable Court, and then and there presented his motion for leave to file a petition for a writ of mandamus, to compel the said judge to prepare, settle, seal and file, as of August 20, 1918, a proper bill of exceptions, showing the evidence introduced, objections and exceptions and all rulings made by said court.

December 16, 1918, motion for leave to file said petition for a writ of mandamus, was by this honorable court denied.

BRIEF AND AUTHORITIES.

I.

(a) THAT THE INDICTMENT, AND EACH COUNT THEREOF, FAILS TO STATE ANY CAUSE OF ACTION OR ANY CRIME KNOWN TO THE CONSTITUTION AND LAWS OF THE UNITED STATES.

(b) THAT SAID INDICTMENT, AND EACH COUNT THEREOF, ARE INSUFFICIENT AND IN VIOLATION OF ARTICLE SIX OF AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN THAT THEY DO NOT INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF ACCUSATION AGAINST HIM.

Article 6 of Amendments to the Constitution of the United States.
United States v. *Peters*, 7 Pet. 142.
United States v. *Cook*, 17 Wall. 174.
United States v. *Cruikshank et al.*, 92 U. S. 557-558.

Section 3, Act of June 15, 1917.
Section 4, Act of June 15, 1917.
Section 37 of the Criminal Code.
Goldman et al. v. *United States*, 245 U. S. 474.
Remmers v. *Remmers et al.*, 217 Mo. 541.

(c) THAT THE MATTERS CHARGED IN THE DIFFERENT COUNTS OF THE INDICTMENT CANNOT, UNDER THE CONSTITUTION, BE MADE PENAL.

Section 8 of Article 1 of the Constitution.
Section 3 of Article 3 of the Constitution.

Article 1 of Amendments to the Constitution.
Federalist No. 43.
Section 2 of the Sedition Act of 1798.
Judge Cooley's Constitutional Limitations, 6th Ed. p. 526.
Lord Chatham, in British Parliament, 1777.
Mr. Fox's Statement in British Parliament.
Daniel Webster's Statement in Congress.
Abraham Lincoln's Statement in Congress.
President Wilson's Letter to Mr. Brisbane.

(d) THE POWER TO ABRIDGE THE FREEDOM OF SPEECH AND OF THE PRESS COMES WITHIN THE POLICE POWERS OF THE STATE.

Article 10 of Amendments to the Constitution of the United States.
Section 14 of the Bill of Rights of the Constitution of Missouri.

II.

The District Court erred in overruling the demurrer to each count of the indictment.

(See cases cited under the First Point and Argument.)

III.

The District Court erred in overruling the demurrer to the evidence.

(See Argument under the Sixteenth Point.)

IV.

The District Court erred in overruling the demurrer to the evidence.

(See Argument under the Sixteenth Point.)

ARGUMENT.

I.

The first count of the indictment fails to state any cause of action or any crime known to the Constitution and the Laws of the United States.

The first count is in words and figures as follows, to-wit:

(Print 3 to 26 inclusive of Transcript.)

"*United States of America, Western Division, Western District of Missouri.*

In the District Court of the United States for the Western Division of the Western District of Missouri, April Term, 1918.

The Grand Jurors of the United States of America, duly and legally chosen, selected, drawn and summoned from the body of the Western Division of the Western District of Missouri, and duly and legally examined, impaneled, sworn and charged to inquire of and concerning crimes against the United States of America in the Western Division of the Western District of Missouri, on their oaths present and charge that at all times mentioned in this indictment the United States of America was at war with and against the Imperial German Government; and that on or about the 22nd day of June, A. D. 1917, and from and after said date up until the 14th day of December, A. D. 1917, one CARL GLEESER and one JACOB FROHWERK were engaged in the preparation, publication, distribution and circulation of a certain news-

paper in the city of Kansas City, in Jackson County, Missouri, and in the Western Division of the Western District of Missouri, which said newspaper was known, designated and entitled 'MISSOURI STAATS ZEITUNG,' and was then and there by said CARL GLEESER and JACOB FROHWERK so prepared, published, distributed and circulated weekly, that is, once each week, during the period of time aforesaid; and that said newspaper during the period of time aforesaid was generally circulated throughout the city of Kansas City aforesaid, and throughout the said State of Missouri; and that they, the said CARL GLEESER and JACOB FROHWERK, so being engaged in the preparation, publication, distribution and circulation of said newspaper, did, on or about the 22nd day of June, A. D. 1917, at Kansas City, in Jackson County, Missouri, and within the Western Division of the Western District of Missouri, and within the jurisdiction of this court unlawfully, wilfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown, to commit an offense against the United States of America, that is to say, to violate Section 3 of Title 1 of the Act of Congress approved June 15, A. D. 1917, entitled: 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States and for other purposes,' by wilfully causing and attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States and

to commit an offense against the United States of America, that is to say, to violate Section 3 of Title 1 of the Act aforesaid, by wilfully obstructing the recruiting and enlistment service of the United States to the injury of the said service and to the injury of the United States, when and while the United States of America was at war with the Imperial German Government, as aforesaid.

And that thereafter and pursuant to the unlawful and felonious conspiracy, confederation and agreement together, aforesaid, and to effect the object thereof, aforesaid, they, the said CARL GLEESER and JACOB FROHWERK, did unlawfully, wilfully and feloniously on or about the 6th day of July, A. D. 1917, at Kansas City, within the Western Division of the Western District of Missouri, and within the jurisdiction of this court, prepare, print, publish, distribute and circulate, and cause to be prepared, printed, published, distributed and circulated in and by means of and as a part of the newspaper aforesaid known, designated and entitled 'MISSOURI STAATS ZEITUNG' and in the issue thereof bearing date Kansas City, Mo., 6 July, 1917, certain reports, statements, communications and alleged news items, in words and figures as follows, to-wit:

'COME LET US REASON TOGETHER.'

(Here follows 13 articles, which we'll quote under the head of each separate count, from the second to and including the thirteenth count, of said indictment.)

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

April 23rd 1917, the said JACOB FROHWERK filed the following demurrer to said indictment, to-wit:

DEMURRER TO THE INDICTMENT.

(Print 73 to 76 inclusive.)

First. That said indictment and each count thereof fails to state any cause of action or any crime known to the Constitution and laws of the United States.

Second. And for further cause of demurrer specially stated, the defendant states:

That neither the said indictment or any count thereof sets forth any violation of the Act of June 15, 1917.

That the said Section 3 of the said Act 1, under which said indictment professes to have been drawn, provides that "Whoever, when the United States is at war, shall wilfully make or convey *false reports* or *false* statements *with intent* to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever * * * shall wilfully cause or attempt to cause insubordination, disloyalty * * * shall be punished," etc. (Italics by defendant.)

There is no charge that said articles were *false;* nor is it shown or alleged how or in what manner said articles could defeat "military or naval forces of the United States"; how they could promote the success of its ememies, or "obstruct recruiting or enlistment," nor illegal *intent* alleged.

In brief there is nothing shown that the said publication was not legitimate and proper. Comment on

public and important matters even though it should appear any of them were unfounded or an error as to conclusions or deductions, are not illegal by the act; nor is there any allegation of criminal intent.

Third. THE SAID ACT OF JUNE 15TH, 1917, IS UNCONSTITUTIONAL AND THEREFORE VOID, BECAUSE IT SEEKS TO MAKE MANY ACTS WHICH ARE TREASON BY THE CONSTITUTION, ONLY AN ORDINARY FELONY.

That said Act (Section 1) makes provision for persons who go upon or in any way obtain certain information, or do certain other acts therein named shall be guilty as therein stated.

And (Section 2) any person who does certain other acts in procuring information shall also be guilty.

The whole tenor of the act shows that the acts therein are prohibited and made criminal solely if obtained to the injury of the United States by being communicated to the public enemy.

Therefore, said Acts constitute the person, a spy, condemned under military law and if by citizen and the information is sent or attempted to be sent, is an overt act and constitute the crime of treason under the last clause of Article 111, Section Three of the Constitution.

It is "adhering to their enemies, giving them aid and comfort." Hence, these and some other provisions being treason by the Constitution, Congress can make them nothing else. And said sections and provisions are so blended that all must fall.

And the publications set forth in the different counts of the indictment are not and cannot be made to come within the provisions and terms of other parts of said Espionage Act.

And said Act has heretofore, through oversight or otherwise, been perverted to purposes unwarranted by its terms.

Fourth. THAT THE SAID ACT IS UNCONSTITUTIONAL FOR THE REASON THAT ON THE REVOLUTION ALL POWERS OF GOVERNMENT DESCENDED TO AND VESTED IN THE SEVERAL STATES; THAT THE CONSTITUTION OF THE UNITED STATES CONSISTS OF SPECIFIED AND NAMED POWERS, AND ALL NOT SO DELEGATED ARE EXPRESSLY RESERVED TO THE STATES RESPECTIVELY. BUT NO POWER WHATEVER OVER PRESS OR SPEECH WAS SO DELEGATED TO THE UNITED STATES, OR PROHIBITED TO THE STATES; NOR IS IT "NECESSARY AND PROPER" TO ANY EXPRESS POWER, MORE ESPECIALLY AS ITS ATTEMPTED EXERCISE WOULD DEPRIVE THE STATE OF ONE OF ITS POLICE POWERS RESERVED TO THE SEVERAL STATES.

NEXT, NOT BEING SO DELEGATED, ALL POWER OVER THE PRESS AND SPEECH, TOGETHER WITH RELIGIOUS FREEDOM IS RESERVED TO THE SEVERAL STATES FOR GREATER SECURITY, AND IS EXPRESSLY

PROHIBITED TO THE UNITED STATES BY THE FIRST AMENDMENT.

Fifth. The first count is for conspiracy. In the charging part it fails to set out the particulars—the time, place, scope and object of the alleged agreement and conspiracy. And this failure and fatal defect is not aided by the subsequent allegation of the claimed overt act.

Sixth. The said indictment sets forth more than one alleged crime. It sets forth in the first count certain alleged overt acts consisting of certain publications. It then founds a number of counts upon these separate articles, thus defining more than one crime in the same indictment.

Seventh. The indictment sets forth in one count more than one article. Each separate publication, if a crime, is a separate offense in and of itself, and therefore must be stated in a separate count.

Eighth. That said indictment sets forth no criminal *intent*, assuming the power over press and speech legal, it could not apply wherein the publication there is a criminal intent, and not to publications, even though objectionable without there was such criminal intent.

Ninth. That said indictment and each count thereof is fatally defective and states no offense for other causes and reasons.

Wherefore, the defendant prays judgment that he go hence without day and for costs.

Jos. D. Shewalter,
Attorney for Defendant."

June 24, 1918, the defendant filed his motion to dismiss, in words and figures as follows, to-wit (print 79 to 80 inclusive):

"MOTION TO DISMISS.

Now comes the defendant, and appearing for the purposes of this motion only, and saving and excepting all objections, moves the court to dismiss the indictment, and to strike the cause from the docket, for the following reasons:

1. The overt act set forth in the first count of the indictment, is founded on Section 3, Act of June 15th, 1917, and the remaining counts are founded on the said section of the said Act.

That said section has been revised, re-enacted, and forms a part of the Act approved May Twenty-first, 1918, whereby the said Act, upon which the indictment is founded, together with the penalty therein prescribed, ceases to exist.

That by the last Act, Congress intended to legislate, and in fact did legislate, anew on the whole subject of said Section 3, Act June 15, 1917, and by a substitute statute, embracing the whole of the former section, and other offenses, substituted a new law, covering the entire subject, as set forth in said Section 3, now known as the Act of May 21, 1918. Therefore, there cannot exist two laws on the same subject, and the last law alone now exists.

Wherefore, defendant cannot be further prosecuted under the old law, as it is now merged in the new; nor

car he be prosecuted under the new Act, because the indictment is not founded thereon, and it only dates from approval, and so was not in force at the date of the alleged offenses.

All of the above is manifest from the Act of May 21, 1918. Its title is: 'An Act to Amend Section 3,' etc. It provides that said section of the Act of June 15, 1917, 'be, and the same is hereby amended to read as follows,' thereby substituting one law for the old law upon which the indictment is founded. And this is made clear by the absence of any repealing clause, thus showing an intention to substitute a new law, covering the entire scope of the old, with additional offenses.

2. There can exist no law to be enforced without a penalty. A new or a substitute penalty is created by the Act of May 21, 1918, and is the only one existing. Defendant cannot be punished under the substituted penalty, because it only exists by virtue of the new law; that it is the same as the old, is immaterial, since, as said, it exists only by the new law.

Wherefore, the defendant prays that the indictment be dismissed, and the cause stricken from the docket.

J. D. SHEWALTER,
Attorney for Defendant."

THIS COUNT IS INSUFFICIENT AND IN VIOLATION OF ARTICLE SIX OF AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DOES NOT INFORM SAID DEFENDANT OF THE NATURE AND CAUSE OF ACCUSATION AGAINST HIM.

Article 6 of the Amendments to the Constitution of the United States provides:

> "IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT * * * AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION."

Mr. Chief Justice WAITE, speaking for this Honorable Court, in case of *United States* v. *Cruikshank et al.* (1875), 92 U. S. l. c. 557-558, said:

> "In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *United States* v. *Mills*, 7 Pet. 142, this was construed to mean that the indictment must set forth the offense with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;" and in *United States* v. *Cook*, 17 Wall. 174, that "every ingredient of which the offense is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading, that where the definition of the offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars.' 1 Arch. Cr. Pr. & Pl. 291."

This count is predicated upon section 4 of the Espionage Act of June 15, 1917 (Sec. 10212d U. S. Comp. St. 1916), and provides:

> "If two or more persons conspire to violate the provisions of sections two or three of this title, and

one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the Act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine."

Section 37 of the Criminal Code, being the Act of March 4, 1909 (Sec. 10201 U. S. Comp. St. 1916), provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

Section 3 of the Act of June 15, 1917 (Sec. 10212c U. S. Comp. St. 1916), provides:

"Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of

> the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

This indictment was returned on the 23rd day of April, 1918. By Act of May 16, 1918 (Sec. 10212c, *supra*), said Section 3 was amended. Of course the Act as amended could not be *ex post facto*, so it need not be considered in this case.

It will be noticed that the punishment prescribed by Section 3 of said Act of June 15, 1917, is imprisonment for not more than *twenty years*, while said Section 37 of the Criminal Code limits the imprisonment to not more than *two years*. The defendant in this case was sentenced to imprisonment for a term of *ten years*. It is evident that the Department of Justice must have discovered some flaw in said Act of June 15, 1917, because in the case of *United States* v. *Emma Goldman and others*, the defendants were prosecuted under Section 37 of the Criminal Code.

Mr. Chief Justice WHITE, in case of *Goldman et al.* v. *United States* (Jan. 14, 1918), 245 U. S. 474, 38 Sup. Ct. Rep. 166, held that:

> "Under Criminal Code (Act March 4, 1909, c. 321), §37, 35 Stat. 1096 (Comp. St. 1916, 10201, §37, * * * an unlawful conspiracy and the doing of overt acts in furtherance of the conspiracy is of itself inherently and substantively a punishable crime, irrespective of whether the result of the conspiracy has been to accomplish its illegal end."

It is too plain for any argument that this count does not state facts sufficient to constitute an offense against the laws of the United States. It charges that the defendants "did * * * unlawfully and feloniously conspire, confederate and agree together and with divers other persons, to the Grand July unknown, to commit an offense against the United States of Amarica, that is to say, to violate Section 3, Title 1 of the Act of Congress approved June 15, 1917, entitled 'An Act to punish acts of interference with the foreign relations, the neutrality and the foreign commerce of the United States, to punish Espionage, and better to enforce the criminal laws of the United States and for other purposes' by wilfully causing and attempting to cause insubordinations, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States; that is to say to violate Section 3 of Title 1 of the Act aforesaid by wilfully obstructing the recruiting and enlistment service of the United States to the injury of the said service to the United States and to the injury of the United States when and while the United States was at war with the Imperial Government of Germany as aforesaid."

It will thus be seen that this count of the indictment simply follows the language of said Section 3, *supra*. That is not sufficient. It does not set forth the means proposed to be used by the defendants to accomplish the purpose of such conspiracy.

Mr. Justice GRAY, in case of *United States* v. *Carll* (1882) 105 U. S. 611, 26 Sup. Ct. Rep. 1135, laid down this rule of pleading:

"In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless the words themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of the statutes on the like matter, enables the court to infer the intent of the legislature does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. *U. S.* v. *Cruishank*, 92 U. S. 542 (XXIII, 588); *U. S.* v. *Simmons*, 96 U. S. 360 (XXIV, 819); *Com.* v. *Clifford*, 8 Cush. 215; *Com.* v. *Bean*, 11 Cush. 414; *Com.* v. *Bean*, 14 Gray, 52; *Com.* v. *Filburn*, 119 Mass. 297."

Mr. Chief Justice FULLER, in *Pettibone* v. *United States*, 148 U. S. 197, 13 Sup. Ct. Rep. 542, held:

"The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital. *United States* v. *Hess*, 124 U. S. 486 (31:516). And in *Britton* v. *United States*, 108 U. S. 199 (27:698), it was held, in an indictment for conspiracy under Section 5440 of the Revised Statutes, that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of conspiracy."

As to the charging of a conspiracy to violate section 3 of said act, and setting out the title to said Act, and

the substance of such Act, we respectfully submit that such allegations are wholly insufficient. No member of the bar would seriously contend that charging a person with having violated a certain specific section of the criminal code, and the nature of its contents, would be sufficient to charge a violation thereof.

What is conspiracy? Mr. William A. Martin, author of the subject "Conspiracy," 12 Corpus Juris, page 554, says: "By a federal statute it is made a punishable offense for two or more persons to conspire to commit an offense against the United States. Conspiracy, as used in this statute, means an unlawful agreement to do some act which by some law of the United States has been made an offense, and it includes both felonies and misdemeanors."

Section 37 of the Criminal Code prohibits conspiracy to commit any offense against the United States. This section covers all kinds of crime. Section 3 of the Act of June 15, 1917, however, is limited only to such times as the United States is at war, and prohibits only the following acts: (1) *To wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States.* (2) *To promote the success of its enemies.* (3) *To willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States.* (4) *To willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States.*

Now, it will be noticed that Section 3, *supra*, does not prohibit the conveying of *true reports* or *true statements*, but only those which are *false*. Nevertheless, this count does not allege that the reports or statements were *false* or were made with a criminal intent. Conspiracy to commit a crime cannot be sustained, unless the indictment charges an offense against a valid Act of Congress. This is well settled by Mr. Justice CLARKE, in *United States* v. *Gradwell et al.*, (1917) 243 U. S. 476, 37 Sup. Ct. Rep. 407, in which this Honorable Court properly held that the District Court was right in sustaining a demurrer to the indictment.

The indictment in case of *The United States* v. *William D. Haywood* and other members of the I. W. W., is a great improvement upon the indictment in this case. The first count therein charges conspiracy through interference with and the prevention of the transportation of such articles and of said military and naval forces; and that said organization, * * * has also been one for discouraging, obstructing and preventing the prosecution by the United States of said war between the United States and the Imperial German Government, and preventing, hindering and delaying the execution of said laws above enumerated, by requiring the members of said organization available for duty in said military and naval forces to fail to register, and to refuse to submit to registration and draft, for service in said military and naval forces, and to fail and refuse to enlist for service therein, and by inciting others so to do, notwithstanding the requirements of said laws in that behalf and not-

withstanding the patriotic duty of such members and others to so register and submit to registration and draft, and so to enlist, for service in said military and naval forces, and notwithstanding the cowardice involved in such failure and refusal; which last mentioned object of said organization was also to be accomplished by the use of all the means and methods aforesaid as a protest against, and as a forcible means of preventing, hindering and delaying, the execution of said laws of the United States, as well as by the forcible rescue and concealment of such of said members as should be proceeded against under those laws for such failure and refusal on their part, or sought for service or for enlistment and service in said military and naval forces. One of the overt acts consisted in publishing in the Solidarity, a newspaper published at Chicago, the following article:

"Had we the power we would stop every ship, train, mine and mill, every food and supply plant,—every wheel of industry and thus paralyze the machinery of murder and make it impossible for the ignorant man-killers of the bosses to gather their toll of the life blood of foreign slaves. We would extend the hand of brotherhood to the so-called 'enemy' and strangle the gurgle for war in the fat throat of the blood bloated money lenders of Wall Street before it became articulate."

No such allegations are contained in the indictment in the case at bar.

To illustrate: It must be conceded that an indictment must be more specific than a petition in a civil ac-

tion for fraud. In *Remmers* v. *Remmers et al.* (1909) 217 Mo. 541, the Supreme Court of Missouri laid down, what we believe to be the general rule of pleading fraud and deceit, as follows:

> *"To state a cause of action for deceit it is essential to aver that the representations made by the defendants were false and known by them to be false, and that they were made with the intention of deceiving plaintiff and that plaintiff was deceived thereby, and that relying upon them he was induced to act to his injury."*

This indictment does not charge, in the language of Section 3 of the Act of June 15, 1917, that the defendants willfully made or conveyed false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies.

By reason of the premises aforesaid, we respectfully submit that the first count of the indictment does not state facts sufficient to constitute any offense against the laws of the United States, and that the District Court committed error in overruling the demurrer thereto.

* * * * * * *

(b) THE MATTERS CHARGED IN THE DIFFERENT COUNTS OF THE INDICTMENT, CANNOT, UNDER THE CONSTITUTION OF THE UNITED STATES, BE MADE PENAL.

The Constitution of the United States is the foundation upon which our government stands. The Declaration of Independence is the corner stone in that foundation.

When the Declaration of Independence was adopted, in 1776, it was declared:

> "WE HOLD THESE TRUTHS TO BE SELF-EVIDENT; THAT ALL MEN ARE CREATED EQUAL; THAT THEY ARE ENDOWED BY THEIR CREATOR WITH CERTAIN INALIENABLE RIGHTS; THAT AMONG THESE ARE LIFE, LIBERTY AND THE PURSUIT OF HAPPINESS."

Section 8 of Article 1 of the Constitution provides that the Congress shall have power to do certain things. That section is an absolute limitation upon the power of Congress. No laws can be enacted by Congress, which are not included in said section.

Section 3 of Article 3 of the Constitution defines treason, as follows:

> "SEC. 3. TREASON AGAINST THE UNITED STATES. *Treason against the United States shall consist only in levying war against them, or adhering to their enemies, giving them aid and comfort.*"
>
> "*The Congress shall have power to declare the punishment of treason*, but no attainder of treason shall work corruption of blood, etc."

The punishment upon conviction of treason is death.

Article 1 of Amendments to the Constitution of the United States, which is a limitation upon the power of Congress, provides:

> "RELIGIOUS LIBERTY—FREEDOM OF SPEECH—RIGHT OF PETITION—CONGRESS SHALL MAKE NO LAW RESPECT-

> ING THE ESTABLISHMENT OF RELIGION, OR PROHIBITING THE FREE EXERCISE THEREOF; OR ABRIDGING THE FREEDOM OF SPEECH, OR OF THE PRESS, OR THE RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES."

Let us illustrate: Suppose that Congress should pass a law providing that the Roman Catholic Church should be the only established church in the United States, and that to worship in any protestant church should be prohibited. Would any court, high or low, uphold such a law? No. On the other hand, suppose that Congress should pass a law providing that the Lutheran, Methodist, Baptist, Christian, Episcopalian or Presbyterian church should be the only established church in the United States, and that to worship in any other church should be prohibited. Would any court, high or low, uphold such a law? No. To state the question is to answer it. Everybody would condemn any such laws, and any court would declare such a law to be absolutely unconstitutional, null and void.

> However the same constitutional amendment provides that "CONGRESS SHALL MAKE NO LAW * * * ABRIDGING THE FREEDOM OF SPEECH, OR OF THE PRESS."

We respectfully submit that Section 3 of Article 3 of the Constitution of the United States, having defined the crime of treason, and the First Amendment to the Constitution having guaranteed the right of free speech

and of the press, that Congress is without power to designate any lesser act, or other or different offense, along such line, against the United States, as a crime, other than that which constituted treason at the time that the Constitution was adopted, and that the statements contained in the articles published would not constitute treason.

As it was the intent of the founders of this great government, and the meaning of the Constitution, that, when provision was made that treason against the United States should consist *only* in levying war against the United States, or adhering to their enemies, giving them aid and comfort, no lesser act along such line could be made penal; that the attempt of Congress to designate the things mentioned in the Act of June 15, 1917, called espionage, is an attempt to enact, under another name, that which the Constitution has prohibited.

Webster defines "Espionage" to be:

> "The practice or employment of spies; the practice of watching the words and conduct of others, and attempting to make discoveries, as spies or secret emissaries; the practice of watching others without being suspected, and giving intelligence of discoveries made."

It seems to us quite clear that by reason of the adoption of the above constitutional limitations it was the intent of the founders of our government—ever jealous of personal liberty, the cost of which was then, as we cannot at this time fully appreciate, impressed upon their minds by the struggle through which they had

just passed—to leave nothing in relation thereto in uncertainty; that they intended, and said so, in plain words, that Congress should have no power to interfere with the free expression of thought and the free right to the publication thereof, as well as the right to petition for redress, unless accompanied by acts which amounted to levying war against the United States, adhering to their enemies, giving them aid and comfort. Libels, slander and sedition were left as questions for the respective states, of which Congress had no jurisdiction. In other words, there was no opportunity left to Congress to create what Madison defined as "new fangled and artificial treason," whether the transaction be designated sedition, espionage, or what not. While the Constitution was still in its infancy Madison, after citing the section of the Constitution aforesaid, wrote, Federalist No. 43:

> "As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restrained Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author."

In 1798 Congress did pass the Sedition Act. Section 2 of that Act provided:

> "If any person shall write, print, utter, or publish * * * any false, scandalous, malicious, writing against the Government of the United States, * * * with intent to defame the said Government, * * * or to excite any unlawful combination therein for opposing or resisting any of the laws of the United States, or any act of the President of the United States done in pursuance of such law * * * or to aid, encourage or abet any hostile design of any foreign nation against the United States, shall be punished," etc.

Judge Cooley, in his admirable work on Constitutional Limitations, 6th Edition, page 526, in discussing this Sedition Law, says:

> "The Sedition Law was passed during the administration of the elder Adams, when the fabric of Government was still new and untried, when many men seemed to think that the breath of heated party discussions might tumble it about their heads. Its constitutionality was always disputed by a large party, and its impolicy was beyond question. It had a direct tendency to produce the very state of things it sought to repress. The prosecutions under it were instrumental, among other things, in the final overthrow and destruction of the party by which it was adopted, and it is impossible to conceive at the present time of any such a state of things as would be likely to bring about its re-enactment or the passage of any similar repressive statute."

Daniel Webster, when this country was at war, in opposing the administration, said:

> "A free government with arbitrary means to administer it, is a contradiction. Free government without adequate provision for personal security is an absurdity. A free government with an un-

controlled power of military conscription is a solecism, at once the most ridiculous and abominable that ever entered the head of a man. Sir, I invite the supporters of the measure before you to look into their actual operation. * * * Anticipate the scene, sir, when the class shall assemble to stand its draft and to throw the dice of blood. What a group of wives and mothers and sisters, of helpless age and helpless infancy, shall gather around the theatre of horrible lottery, as if the stroke of death were to fall from heaven before their eyes on a father, a brother, a son, or a husband. And in a majority of cases it will be the stroke of death. * * * If, sir, in this strife he fall, if, while ready to obey every rightful command of government, he is forced from his home against right, not to contend for the defense of his country, but to prosecute a miserable and detestable project of invasion, and in that strife he fall, 'tis murder. It may talk above the cognizance of human law, but in the sight of heaven 'tis murder, and though millions of years may roll away, while his ashes and yours lie mingled together in the earth, the day will yet come when his spirit and the spirits of his children must be met at the seat of omnipotent justice. May God in his compassion shield me from any participation in the enormity of this guilt."

Daniel Webster was never accused of being a traitor. Neither was Lord Chatham, in the British Parliament, November 18, 1777 (at the time of our revolutionary war), when he voiced the sentiment of the minority as follows:

"I would sell my shirt off my back to assist in proper measures, properly and wisely conducted, but I would not part with a single shilling to the present ministers. Their plans are founded in destruc-

> tion and disgrace. It is, my lords, a ruinous and destructive war, it is full of danger, it teems with disgrace, and must end in ruin. * * * If I were an American as I am an Englishman, while a foreign troop was landed in my country I never would lay down my arms! Never! Never! Never!"

During the same struggle Mr. Fox, then in the minority, with his country at war, said:

> "I could not consent to the bloody consequences of so silly a contest, about so silly an object, conducted in the silliest manner that history or observation had ever furnished an instance of, and from which we are likely to derive poverty, misery, disgrace, defeat, and ruin."

Why, even our own Abraham Lincoln, while a representative in Congress, when our country was at war with Mexico, did not hesitate to express his opposition to the position of the majority with regard to such war, voting for a resolution which declared that the Mexican war had been "unnecessarily and unconstitutionally begun by the President of the United States."

(c) THE POWER TO ABRIDGE THE FREEDOM OF SPEECH AND OF THE PRESS COMES WITHIN THE POLICE POWER OF THE STATES.

Article X of Amendments to the Constitution of the United States provides:

> "POWERS RESERVED TO THE STATE OR PEOPLE.—THE POWERS NOT DELEGATED TO THE UNITED STATES BY THE CONSTITUTION, NOT PROHIBITED BY IT TO THE STATES, ARE RESERVED TO THE STATES RESPECTIVELY, OR TO THE PEOPLE."

We respectfully submit that as Article 1 of Amendments to the Constitution of the United States specifically prohibits Congress from making any laws abridging the freedom of speech, or of the press, the powers to so legislate were reserved to the States, or to the people.

On the second day of August, 1875, the Constitution of Missouri was adopted. Section 14 of the Bill of Rights provides:

> "SEC. 14. FREEDOM OF SPEECH, PRESS —LIBEL, TRUTH IN JUSTIFICATION— DUTY OF JURY.—THAT NO LAW SHALL BE PASSED IMPAIRING THE FREEDOM OF SPEECH. That every person shall be free to say, *write* or *publish whatever he will on any subject*, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact."

By reason of the premises aforesaid, we respectfully submit that Congress has no power to abridge the freedom of speech, and of the press, and that the Espionage Act is unconstitutional.

We respectfully call Your Honor's attention to the fact that on January 9, 1919, Senator France of Maryland introduced, in the Senate of the United States, an Act to Repeal the Espionage Act, as being unjustifiable and unconstitutional.

By reason of the premises aforesaid, we respectfully submit that the first count of said indictment does not state facts sufficient to constitute any offense against the laws of the United States, and that the District Court committed error in overruling the demurrer thereto.

* * * * * * *

II.

The second count of the indictment fails to state any cause of action or any crime known to the Constitution and the Laws of the United States.

The second count is in words and figures as follows, to-wit (Print 27 to 30, inclusive):

"SECOND COUNT.

And the Grand Jurors, aforesaid, chosen, selected, drawn, summoned, examined, impaneled, sworn and charged as aforesaid, upon their oaths do further present and charge that on the Sixth day of July, A. D. 1917, and for a long period of time prior thereto, and for a long period of time subsequent thereto, the United States of America was at war with the Imperial German Government; that on or about the Sixth day of July, A. D. 1917, while the United States was at war as aforesaid, with the Imperial German Government, one CARL GLEESER and one JACOB FROHWERK did unlawfully, willfully and feloniously at Kansas City in Jackson County, Missouri, and within the Western Division of the Western District of Missouri, and within the jurisdiciton of this court, attempt to cause disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, in this, that they the said CARL GLEESER and the said JACOB FROHWERK did then and there unlawfully, willfully and feloniously prepare, print, publish, distribute and circulate in and by means of and as a part of a certain newspaper known, designated and entitled 'Missouri Staats Zeitung,' and

in the issue thereof bearing date 'Kansas City, Mo. 6, July, 1917,' certain statements and certain reports, communications, articles and alleged news items, the said newspaper then and there being a newspaper generally circulated throughout the City of Kansas City, Missouri, and throughout the State of Missouri, and throughout other parts of the United States of America; said statements, reports, communications, articles and alleged news items being in words and figures as follows, to-wit:

'Come Let Us Reason Together.'

'We cannot possibly believe it to be the intention of our administration to continue the sending of American boys to the blood-soaked trenches of France. We can not believe that the General Staff has advised such a step which must be put down by every thinking man as a monumental and inexcusable mistake.

It comes no doubt from the great trusts, through their syndicate press, who see only the prospect of big money for themselves.

Come friends, let us consider the proposition for a moment. It is but right that every citizen should fully realize what we are up against.

Omitting all references as to who is to blame for the war, Europe had been preparing for years feverishly for this great slaughter.

August, 1914, found Germany and Austria-Hungary simultaneously attacked from East and West by the mighty and splendidly equipped armies of France and Russia, re-enforced by Serbia and Belgium while Eng-

land's fleet cut them off on the sea from the outside world. Since that time Russia alone has mobilized over 15 million men and lost in dead, wounded and prisoners over 8 million men. Yet notwithstanding this tremendous sacrifice of men and material, and with the further advantage of having to cross only an imaginary line, no treacherous ocean, three thousand miles wide, which divides us from our enemy, that mighty steam roller not only failed to crush Germany and Austria, but was itself completely demolished. As a result Russia is today in the throes of a bloody internal revolution and for years to come has been effectually eliminated from any further successful participation in the conflict. It's hors de combat.

On the other hand France, and later on joined by the million armies of Italy and England, have not been able to dislodge the German invaders to any appreciable extent from their territory.

Now we are told, personal bravery and heroism does not count in this war, it is a game of science of the highest order.

This being so, we should apply some of it ourselves. In other words, let common sense and reason govern our action instead of blind passion and fanaticism.

Common sense must tell every man, that when the Entente powers could not defeat the Central Powers with their mighty armies, we can not do so with a line of communication to maintain over three thousand miles long and subjected to an attack from the German U-boats against which no successful weapon has yet been found.

We are told that we have to take the place of Russia in this war. We have to do more than that, we have to replace practically France too; for we are told that in her armies boys, fourteen years old, are serving today. This is the best evidence to what dire straits the manpower of France has been reduced. England has exhausted the manpower of Canada, Australia and her other colonies. Herself, she remains true to her sacred traditions of saving her own men, of whom something like two million trained men are still in England. Why is not England sending them over to France instead of us? Her line of communication is the hundredth part of what we will have to guard, and she has a far greater fleet than we have to do this work.

It is conceded, that it will be a year before we can land an army of a million men in France. They can be sent over only in small bodies for lack of sufficient tonnage to carry them. We ask, of what possible effective strength can they be in France? Why, it's a drop in the bucket, and to do so appears to be outright murder without serving anything practical.

These are strong words, we admit, but we would not be true to our allegiance and our love to this country, if we did not utter these words of warning to the American people. Neither would we be true to this Republic if we did not tell of the unconquerable spirit and undiminished strength contained in the German nation.

We have been borne of that nation, we know its feelings, we have read its papers, and know therefore whereof we speak. Germany, let it be understood, con-

siders herself attacked and is imbued with that thought to the last man. She will fight to the last drop of blood, and it is this feeling, that amounts almost to a religious faith, which is the key to the marvelous strength with which she has withstood all the attacks of her enemies, although far outnumbered in men and resources.

Our American neighbors and friends are entitled to this information. Not to utter it would be treason to this—now our country.

This feeling of duty to America prompts us in warning and in protesting against the sending of troops to France even at the danger of being misunderstood.

We feel, our American friends agree with us in regretting the necessity of a war with Germany—with any country for that matter.

Having been involved, should it not be our duty to see to it, that the result should be as little disastrous to ourselves as possible.

Germany has not as yet recognized in any way our declaration of war.

We are being told that unless we fight now on the fields of France, the Allies will be overpowered and Germany will collect her war indemnities from us. If this is the reason for our sending troops over to France, we submit as a wiser course, that every American soldier be kept at home against the time when Germany shall attempt to do her collecting from us. To attack us here at home, she would be at as great disadvantage as we are now in attacking her. Both propositions are equally preposterous and impossible.'

'Independence, Mo., July 3, 1917.

EDITOR STAATS-ZEITUNG: Controversy among friends who are seeking to prevent the terrible sacrifice of life in the European war should be avoided. But the excellent extract from Mr. Hannis Taylor and the justly high standing of that gentleman calls for a correction of an error. He is right in saying that our military force consists only of a regular army, which can be recruited only by voluntary enlistment (and of course volunteer in time of war) and the State Militia. These last, as he says, are to supplement the regular army in three events —to enforce the law, suppress insurrection and repel invasion. This wise military system—the only one where liberty will not be destroyed by military force—was intended to prevent in the words of the Federalist: "Both the excuse and the necessity for a large army, dangerous to liberty." It was also intended to make a foreign war of aggression impossible, because the last was considered as repugnant to Republican government and in the language of Jefferson: "Suited only to government founded upon the reverse idea of military force."

This military system has been completely destroyed by the present administration, and we have gone to the reverse system, rejected by the founders and the Constitution.

But Mr. Taylor seems to think the present force is a part of the militia. It is not. Out state militia has been destroyed, though it is declared by the Constitution:

"A well regulated militia is necessary to the security of a free state." (2 Amn). This security has been destroyed upon the demands of Mr. Wilson.

The present force is a part of the regular army raised illegally. And this I feel confident will be so decided if I can ever get a case in the Supreme Court.

Mr. Taylor also says: "No part of the regular army shall be sent abroad except by the mandate of Congress." Now I say, and the debates in the Convention will bear me out, that there is no power in our Government, Congress or the President, to send an army into a foreign country except it becomes necessary to do so as a part of a defensive war.

The debates in the Convention bear this out when the words "Congress shall have power to make war" were stricken out and the words "declare war" substituted.

But what is the use to talk about the Constitution? We have laid that aside and have a one man government. The question is no longer what does the Constitution say, but what does Mr. Wilson want.'

JOSEPH D. SHEWALTER.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

The foregoing article and letter were written by Mr. Joseph D. Shewalter, the attorney who represented the defendant in the District Court. No action has been taken against him.

(a) THIS COUNT IS INSUFFICIENT AND IN VIOLATION OF ARTICLE SIX OF AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DOES NOT INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF ACCUSATION AGAINST HIM.

(See cases cited under the first count, *supra.*)

A careful reading of this count convinces us that the article and letter upon which said count is based, are simply attacks upon President Wilson and his Administration.

It will also be noticed that the Act of June 15, 1917, does not make any criticism of the President, or of his Administration, a criminal offense. Nevertheless, the defendant has been sentenced to serve ten years in the United States Penitentiary, for publishing the said article and letter.

The defendant is not an attorney. Of course, he is nevertheless supposed to know the law. Mr. Shewalter, the author of the article and letter published, is an attorney, and as such is learned in the law. It would hardly be supposed that Mr. Shewalter would have composed and caused the publication of an article and a letter, knowing that the publication thereof would cause his client to serve ten years in the penitentiary. No doubt Mr. Shewalter assured the defendant that the article and letter contained nothing which would cause him to be punished.

Why, if we turn to Vol. 55, Part 2, Congressional Record, 1700, we find a letter from President Wil-

son, which to our mind plainly shows that he does not consider himself immune from public criticism. His letter is as follows, to-wit:

"THE WHITE HOUSE,

Washington, D. C., April 25, 1917.

ARTHUR BRISBANE,
New York Evening Journal New York American,
New York City.

My dear Mr. Brisbane:—

I sincerely appreciate the frankness of your interesting letter of April with reference to the so-called Espionage bill now awaiting action by Congress.

I approve of this legislation, but I need not assure you and those interested in it that whatever action the Congress may decide upon, so far as I am personally concerned, I SHALL NOT EXPECT OR PERMIT ANY PART OF THIS LAW TO APPLY TO ME OR ANY OF MY OFFICIAL ACTS OR IN ANY WAY TO BE USED AS A SHIELD AGAINST CRITICISM.

I CAN IMAGINE NO GREATER DISSERVICE TO THE COUNTRY THAN TO ESTABLISH A SYSTEM OF CENSORSHIP THAT WOULD DENY TO THE PEOPLE OF A FREE REPUBLIC LIKE OUR OWN THEIR INDISPUTABLE RIGHT TO CRITICISE THEIR OWN PUBLIC OFFICIALS. WHILE EXERCISING THE GREAT POWERS OF THE OFFICE I HOLD I WOULD REGRET, IN A CRISIS LIKE THE ONE THROUGH WHICH WE ARE NOW PASSING, TO LOSE THE BENEFIT OF PATRIOTIC AND INTELLIGENT CRITICISM.

In these trying times one can feel certain only of his motives, which he must strive to purge of selfishness of every kind and wait with patience for the judgment of a calmer day to vindicate the wisdom of the course he has tried conscientiously to follow.

Thanking you for having written me.

Cordially and sincerely yours,

WOODROW WILSON."

At the time that this letter was written, the Espionage Act was pending in Congress. The President approved the same on June 15, 1917, with full knowledge that he had theretofore assured Mr. Brisbane that nothing therein contained should be construed as preventing patriotic and intelligent criticism.

Had the district attorney adhered to the aforesaid construction of the Espionage Act by the President, it follows that no prosecution under this count would have resulted.

By reason of the premises aforesaid, we respectfully submit that the second count of said indictment does not state facts sufficient to constitute any offense against the laws of the United States, and that the District Court erred in overruling the demurrer thereto.

* * * * * * *

III.

That the third count of said indictment fails to state any cause of action or any crime known to the Constitution and Laws of the United States.

The third count, in the same language, charges the publication of certain other statements, reports and communications on July 20, 1917, as follows:

(Print 30 to 32, inclusive)

"We are deeply indebted to Dr. Elliott, professor of international law at the University of California, and a brother-in-law of President Wilson, for having clearly diagnosed the present political situation in the United States.

At a lecture in Berkeley, Cal., the professor states that the Monroe Doctrine is and should be in the discard; that we must forsake our isolation and have our finger in the pie, so to speak, everywhere.

This is exactly as the Staats-Zeitung has sized up the situation and it is precisely upon the wisdom of this change in our policy that we differ from Mr. Wilson.

To state the case plainly: We have thrown the advice of George Washington 'to maintain friendly relations with all, entangling alliances with none' to the winds. We have abandoned the Monroe Doctrine and embarked upon a new and untried policy, that of acquiring a world influence and world empire. In short an 'imperialistic policy.'

This then is bringing out the real issue concerning this war free from all such pretenses as fighting for de-

mocracy, against the Kaiser, because Germany sunk our ships, etc.

Mr. Elliott tells us, the Monroe Doctrine is in the discard. This explanation clears up a great many positions maintained by Mr. Wilson during the war which in the light of American history seemed inexplainable. For instance, it explains why we respected the English blockade and opposed the German blockade, for as Mr. Elliott puts it: 'We must associate with all those states which share our ideals of self government, for a democracy is being a government by the people is the safest guarantee for peace.' Since the Monroe Doctrine is in the discard we presume therefore the association with such states as Mr. Elliott enumerates is too an accomplished fact, that it was so at the beginning of the war in 1914. It too substantiates Mr. Wilson's expression on May 12 that we have no grievances of our own to fight for.

This policy, let it be clearly understood, is not to be decided upon, but is an accomplished fact. We might here make observation how such a change could take place without the express command of the people, if such expressions as this being a government of the people still holds good. We might too with perfect propriety ask who authorized the President to carry into effect a change of such transcendent importance. All of this would be idle at this time and a waste of time. It would lead nowhere.

What we are interested in at this time is the question: 'How has the change worked out so far?' Let us see. We are by reason of having abandoned the Monroe

Doctrine and as a direct result already involved in a bloody war.

Our legislative branch of the government has already appropriated sums of money to carry on the war that staggers the imagination of all mankind. Moreover our nation is in the throes of internal strikes, riots, race wars, etc. For who dares deny that these things are not the result of this change in our policy? Had we remained true to the teachings of our patriotic fathers of the Republic, we would have lived as happy as ever, even though the storm was raging over two other continents.

But we have changed from their ways and instead of remaining neutral as they had under like circumstances, the horrible monster 'greed' made us coin money out of the blood of our brethren in other nations. We have unchained this monster and bidden him to our shores, we have welcomed him to our hearthstones and what else can we now expect, but to be ruled by him?

Truly has it been said: 'What shall it profit a man to conquer the whole world and lose his own soul.'

And now a look further. Suppose we come through it all unscratched and gain what we set out for. England has given the world an example as to what the policy results in. Although it owns one-third almost of the known world, only a very few of its 45 million people are rich, and one-third of its population lives in abject poverty and almost in literal slavery. This result is as inevitable to us as it is to England! Already we have future generations, children yet unborn, mortgaged with an appalling debt. And don't we know, that it is not the rich, but the

middle classes and the poor upon which the burden of beginning of it all and have not even included in these taxation falls the heaviest? And we are now only at the calculations the rivers of human blood it will cost.

The Monroe Doctrine is in the discard, that is at present. There is no manner of remedy for it. But next election, a little over a year from now, the question will then be squarely up to every American elector, whether or not it shall remain in the discard."

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

(a) THIS COUNT IS INSUFFICIENT AND IN VIOLATION OF ARTICLE SIX OF AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DOES NOT INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF ACCUSATION AGAINST HIM.

(See cases cited under the first count, *supra.*)

We respectfully submit that this article does not come within the definition of "Espionage." It can not possibly be construed to be anything but a condemnation of President Wilson's administration, and a severe attack upon England. It would hardly be contended that it would constitute "Espionage" on the part of the defendant to attack the policy of England. The president has plainly indicated, in his said letter to Mr. Brisbane, that so far as he is personally concerned, he would not expect or permit any part of this law to apply to him-

self or his official acts or in any way to be used as a shield against criticism. Nevertheless, the defendant got ten years for publishing the article.

By reason of the premises aforesaid, we respectfully submit that the third count of said indictment does not state facts sufficient to constitute any offense against the laws of the United States, and that the District Court erred in overruling the demurrer thereto.

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IV.

The fourth count of said indictment fails to state any cause of action or any crime known to the Constitution and Laws of the United States.

The fourth count, in the same language, charges the publication of certain other statements, reports and communications, on August 3rd, 1917, as follows (Print 33 to 37, inclusive):

"LANSING ON WAR ISSUES."

"Nothing in recent days has stirred the Nation so deeply as has the speech of our Secretary of State, Robert Lansing, last Sunday at Madison Barracks, N. Y.

Almost during the entire week the question as to the real issues involved in our war with Germany had been under discussion in the U. S. Senate. During these memorable debates Senator Borah made this statement:

'We have our Allies and with them a common purpose, but America is still America, with her own institutions, her individuality in moral and intellectual con-

ceptions of her own people; she is still a sun and not a satellite. Sir, if our own institutions are not at stake, if the security of our own country is not involved, if we as a people and as a Nation are not fighting for our own rights, and the honor and lives of our own people, our declaration of war was a bold and impudent betrayal of a whole people and in its further continuance a conspiracy against every home in the land.'

It was to this challenge and to many others like it, that Mr. Lansing in his speech was to give the answer. What was the answer? Reading every line of that speech over and over again, we fail to find one word or syllable where even only one of the many elements, mentioned by Senator Borah, are involved. Aside from many innuendoes and suppositions there is not one solitary direct assertion of American institutions threatened, American lives involved, or American honor at stake.

The nearest Mr. Lansing comes to mentioning any direct cause for war is in these words:

'The immediate cause of our war with Germany—the breaking of her promises as to indiscriminate submarine warfare—has a far deeper meaning, a meaning which has been growing more evident as a war has progressed and which needed but this act of perfidy to bring it home to all thinking Americans.'

Truth compels us to say, that the above statement of the Secretary of State has been repeatedly denounced as a 'deliberate falsehood' upon the floor of both houses of Congress.

There was no such perfidy as Mr. Lansing charges here and no one knows this better than does Mr. Lansing himself.

The promise of Germany, let it be here repeated, was conditioned upon our own administration prevailing upon England to give up what Mr. Wilson designates as 'an illegal and insufferable blockade.' Germany expressly stated in her note, and we dare Mr. Lansing to deny it, that she would be forced to a return of the ruthless submarine warfare unless Great Britain would cease her illegal blockade.

Mr. Lansing says:

'Imagine Germany victor in Europe because the United States remained neutral. Who, then, think you, would be the next victim of these who are seeking to be masters of the whole earth? Would not this country with its enormous wealth arouse the cupidity of an impoverished though triumphant Germany? Would not this democracy be the only obstacle between the autocratic rulers of Germany and their supreme ambition? Do you think that they would withhold their hands from so rich a prize?

Great God! If we remained neutral? What sort of an audience could it have been that Mr. Lansing dared tell such a palpable untruth?

Almost with the firing of the first gun in the European war we have outraged every sense of morality, decency and violated every provision of international law by furnishing bombs, shot and powder to one of the belligerants.

This action of our administration is the direct cause of this war, but Mr. Lansing dares not tell the truth to the American people. Why does Mr. Lansing ask this question?

'Let me then ask you, would it be easier or wiser for this country, single-handed, to resist a German empire, flushed with victory, and with great armies and navies at its command, than to unite with the brave enemies of that empire in ending now and for all time this menace to our future?'

Germany has existed some two thousand years before and has been flushed with victory in many wars. Now we ask Mr. Lansing, did Germany in all the time of our national existence ever exhibit the slightest designs upon us or for that matter upon any other country? On the contrary, has not Germany been our only consistent friend of all the other belligerents?

The Secretary of State can not name one good and sufficient reason upon which to base his assertion. It is made out of whole cloth. It is more. It is pressed out of a guilty conscience for having violated our neutrality and furnished ammunition and money to the enemies of Germany.

When Mr. Wilson, upon the request of our big financial interests, but against his better and often expressed knowledge of neutrality laws, consented that these laws be deliberately violated; he believed what he was told, that Germany would speedily be crushed. This expectation has not been realized. The principle of law invoked by us in the Civil War against Great Britain for

breach of neutrality would have served as precedent to bring us before the bars of Justice at the close of the war and would have made us all liable for damages inflicted as it did England then.

Patriotic American citizens pleaded in vain with the administration and with Mr. Wilson personally against this breach. The Staats-Zeitung was one of the most ardent and persistent to point out this great wrong and the consequent danger such a policy must eventually bring to our nation. For our efforts in behalf of the honor and the security of our Republic we are called traitors by Mr. Wilson.

That a few men and corporations might amass unprecedented fortunes, we sold our honor, our very soul. We sowed to the winds and are reaping now the whirlwind. This, Mr. Lansing knows, is the true state of affairs, that is the reason we are at war now. We challenge contradiction.

Ever since the wrong step has been taken, our statesmen have floundered in a lot of excuses for the war. Mr. McAdoo has told us, we are fighting because we love the German people. Mr. Lane said: 'It is a war against Mohammedanism,' and only Mr Wilson has been open enough to admit 'We have no grievances of our own.' That is true.

We have gone to war to cover up this awful blunder of our administration and to protect the loans of Wall Street to the Allies with the blood of our American boys and the sacrifices and sufferings of the American people.

This is the sad but true story of it.

Let us trust and pray, that Senator Stone's prediction about this being the greatest blunder yet, shall not come true.

Macon, Mo., July 26, 1917.

Carl Gleeser, Kansas City, Mo.

My dear Sir:

Enclosed please find $1.00 to renew my subscription. I wouldn't be without it for ten times the subscription. I returned from Hot Springs, Ark., where I was for the last month. I sent Nos. 35 & 36 of the Staats-Zeitung to the commanding officer of Military and Naval Hospital at Hot Springs who has forwarded them to the Adjutant General of the U. S. Army. If you can spare me Nos. 36 & 37, I wish you would send them to me as I am keeping a complete file.

Respectfully,

CHAS. P. HESS.

From every principal capital of the belligerents have come a discussion of some sort of peace terms in recent days. A comprehensive summary of these discussions present this situation: The German Chancellor, Dr. Michaelis, stated in his maiden speech before the Reichstag, that the Central Powers are at any time ready to enter into negotiations for peace. Germany, however, can not renew its offer of November, 1916. Such a proposition must come from the other side.

Acting upon this, Senator Lewis, spokesman in the Senate for the administration, on Monday, July 23, urged upon his colleagues the advisability of the United

States prevailing upon all belligerents to enter upon such negotiations. The Senator very correctly pointed out, that the United States was in a better position to undertake this work, than perhaps other belligerents.

Paris, in its discussion, urged on by England, makes such demands upon Germany as are wholly unwarranted by the military situation, and London, of course, sides with France in its discussion.

We are thus confronted with these facts: That but for England and France, the terrible war could be brought to a very quick determination.

Keeping this in mind, let us at this time recall the statement made a short while ago by Ex-President La-Folliers of France. He said: 'France can easily overcome the effect of a lost war. Not so England. Even a drawn war means defeat to England and an end to her world domination. With her prestige of being unconquerable destroyed, not only the colonial empire collapses, but with it her financial system.

A peace on even terms means ruin to her, for her creditors would wipe their slates clean and she would have then as many enemies as she now has allies. Not one of them loves England, they feared her and this fear once destroyed, would destroy England.'

What are the historical facts about the war?

The war was started by the money powers of Great Britain to crush Germany, which has become a dangerous competitor.

What are the results after three years of war? Briefly stated: Russia out for good, will soon permit the

release of tremendous armies to crush Italy, drive the Allies out of Greece and England out of Mespotamia. The German lines in France, so American officers tell us, are impregnable and can be held indefinitely.

The German submarines will have sunk the English merchant fleet, including what is being built now, by February, 1919.

English money power has lost its war against Germany.

Having no grievances of our own to fight for, the question now squarely before the American people is, how far we are willing to sink our fortunes and spend the best blood of the nation to hold off the complete collapse of the English money power.

We do not fail to give full recognition of the tremendous power wielded in this war by our own financial interests through a corrupt press and other channels, and which to all purposes and intents is now allied with that of England. Neither do we fail to realize, that notwithstanding all our boasts of democracy, our public officials are in the last analysis but pawns of this tremendous, invisible power of Wall Street.

But we are not pessimistic enough to have lost all our faith in popular government, when the people are once aroused to the dangers threatening them.

But even were we willing to spend our last dollar and give up our last boy, can we help England from disaster?

In the short space of three years we have seen three of the mighty nations of Europe going down in defeat and now crumbling to pieces.

We have absolutely nothing they did not have when they went into the fight. In fact they had the advantage of a mighty fleet which we have not; they had two splendidly equipped armies and fought at their very own doorsteps while we must travel 3000 miles. The armies were reenforced by those of Italy in the South and all without avail.

Does not the answer come to us, re-echoing through the last three years of undescribable horror and suffering, from the battle fields of Europe—that there has already been an over abundance of human lives and misery sacrificed to the Moloch of gold? We say therefore: Cease firing.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

(a) THIS COUNT IS INSUFFICIENT AND IN VIOLATION OF ARTICLE SIX OF AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DOES NOT INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF ACCUSATION AGAINST HIM.

(See cases cited under the first count, *supra.*)

We take it that the letter from Mr. Chas. P. Hess to Mr. Carl Gleeser (print 10 and 35, respectively), does not belong there at all.

This article is a very severe attack upon Mr. Robert Lansing, Secretary of State, but that does not constitute "Espionage." He sure is not immune from criticism. The President states in his said letter to Mr. Brisbane how far the Espionage Act shall go. That limitation ought to be binding upon the District Attorneys. The President is the Commander in Chief of the army and navy, and his construction of the Espionage Act ought to be binding upon the Department of Justice, especially when that construction is against his own interests and dignity. Nevertheless, the defendant got ten years for publishing the article.

By reason of the premises aforesaid, we respectfully submit that the third count of said indictment does not state facts sufficient to constitute any offense against the laws of the United States, and that the District Court erred in overruling the demurrer thereto.

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V.

The fifth count of said indictment fails to state any cause of action or any crime known to the Constitution and Laws of the United States.

The fifth count, in the same language, charges the publication of certain other statements, reports and communications, on August 10, 1917, as follows (Print 38 to 41 inclusive):

"With every citizen who believes in law and order, the Staats-Zeitung deeply deplores the draft riots in

Oklahoma and elsewhere. Of course we fully agree with those who feel, that the passing of the draft law is a violation of the Constitution. BUT UNTIL PROPERLY CONSTITUTED COURTS OF THE LAND SAY SO, THE LAW MAY BE CRITICIZED, BUT IT MUST BE OBEYED.

As a matter of fact, violence and armed resistance are a wrong in itself and while we believe that draft law wrong, two wrongs never yet have made a right.

Happily, in our country we have every agency provided for us by the framers of the Constitution to right a wrong without having to take recourse to force.

In the draft law, as well as in all others, if we feel aggrieved, we have the courts to which we can go for protection. Should these fail us, we have then the right to petition Congress to repeal the law and should we again fail here, then we can ourselves right the wrong at the next election.

But we shall admit right here and now, that this is all very well and good for those of us to talk who are past the draft age or who have no boys of our own to be drafted. But how does the other fellow feel about it who finds himself subject to the law? Can we comprehend the workings of his mind and heart?

Here he is, called upon to leave his wife and children, or his aged parents, or to give up the boy upon which (whom) he expected to bestow the fruits of his life work and lean upon in the days to come.

Here he is, with the look of anguish and of pleading for help and relief in the eyes of his wife, staring him in

the face, day after day. She is sorrowing and pleading for her husband, the father of her children or their son. The courts are perhaps far away, and if not, he has not the means to ask protection from them. Is not this enough to drive any man to distraction?

And he perhaps further contemplates, that his country is really not in danger, and that he or his boy are to be sent into a foreign land to fight in a cause of which neither he nor any one else knows anything of. And perhaps the suspicion works itself into a conviction, that it is but a war to protect some rich men's money.

We ask who then will arise and pronounce a verdict of guilty over such a man if he stops reasoning and follows the first impulse of nature; "Self preservation"?

If this country is in danger of invasion, no man will find him a slacker or coward refusing to do his full duty, but what possible interest has he in making the world safe for democracy or getting rid of the Kaiser or the Czar or King George or any one else?

Is it not natural to reason thus and while technically he is wrong in his resistance, is he not being more sinned against than he himself has sinned?

Mr. Wilson has said: *"We really have no grievance of our own to fight for."*

Is not then before God and before man the guilt of those who voted without good and sufficient cause upon these men and women, upon the American people, this awful and unnatural sacrifice far greater than the wrong perpetrated by these who now seek to escape the sacrifice by ill advised resistance?

We emphatically reiterate, that we do not endorse their action in any manner, but we would not be human if we could withhold from them our heartfelt sympathy in their tribulation.

A Simple Sum in Simple Numbers.

According to the KANSAS CITY JOURNAL of July 28th, the expense inflicted on the people in this "WAR FOR DEMOCRACY" in Europe and slavery in that part of the British empire known as the U. S. A. is 48 millions per day.

Now "gentle reader" if we are running in debt 48 millions a day, how much are we throwing into this whirlpool of destruction—this slaughter pen, every hour? Answer, 2 millions. If we are spending 2 millions every hour how much are we spending every 30 minutes? Answer, one million. If we are spending one million every thirty minutes, how much are we spending every minute? Answer, $333,333.00.

When we bought into this bankrupt concern, as a part of the consideration we assumed and agreed to pay all the liabilities of the institution. We felt of the people and found a small fraction of American sentiment remaining, so we hit them with only 3 billions. They winced but kept silent. Then came 4 billion more. Terror was imprinted on every countenance but no outcry for the land was full of Janizaries. Then the pile in the center of the table began to increase. Now in round numbers it is 18 billions which is only a penny ante as compared to what will follow. But let us stick a pin

here and see how we stand. The assessed value of all the property in Kansas—that is the entire state, is valued at 3 billions. Now, if we divide 18 billions by 3 billions the quotient is 6. Hence, we have paid into the concern 6 full grown states each of the value of Kansas.

I verily believe that if we get China, all North and South America, including the convicts and savage tribes of these, and all other countries and throw in the Fiji Islands and the Cannibals of Africa, we can make the galled jades wince. Germany is only a small province, only three-fourths as large as Texas, and if we can organize such an alliance as the one suggested and carry on the war for three years, she will pull down her colors. But in that event I shall pray to all the gods at once that they prohibit us from inflicting on them our kind of democracy. That is ours and we have no right to give it away and especially to those "Barbarous Huns."

Witness my hand at Larned, Kansas, this 6 day of August, 1917.

G. Polk Cline.

Lloyd George in his speech last Saturday said: "War is ghastly business, but it is not so bad as peace."

Well, as far as we are concerned, we have no complaint to make in that regard. Germany has never done us any harm, in fact was the best friend we ever had.

If Germany maintained a big army, we take it that her neighbors on the East and West of her compelled her to keep pace with them.

But then that is nothing to us compared, for instance, to the English naval program of building two ships for her nearest competitor's one.

Why is it necessary for England to adhere to this program?

Big armies in Europe do not frighten us. We know they can not march across the Atlantic. What we are interested in and will have to keep an eye on, is the naval program of any country, particularly England. We had had quite a touch of her crushing power when she compelled us to forego our legitimate trade with other belligerents and neutrals since war started.

Why were we asked to "buy a bale of cotton" in the Fall of 1914? Because English naval power held our commercial trade in the hollow of her hand by reason of her overwhelming naval power.

She hauled down our flag, dumped our mail in the ocean, took our ships into her harbors, in fact acted just about as she pleased with us—and forced us into the war to pay her bills to boot.

Americans should open their eyes and learn to understand, that it is the autocracy of England we should really be fighting instead of autocracies elsewhere.

Contrary to the form of the state in such cases made and provided, and against the peace and dignity of the United States of America."

(a) THIS COUNT IS INSUFFICIENT AND IN VIOLATION OF ARTICLE SIX OF AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DOES NOT INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF ACCUSATION AGAINST HIM.

(See cases cited under the first count, *supra.*)

This article was published on August 10, 1917. It is an attack upon the Selective Draft Act. It states that the Staats-Zeitung fully agrees with those who feel, that the passing of the draft law is a violation of the Constitution. "*But until properly constituted courts of the land say so, the law may be criticized, but it must be obeyed.*" It further states that "*Happily, in our country we have every agency provided for us by the framers of the Constitution to right a wrong without having to take recourse to force. In the draft law, as well as in all others, if we feel aggrieved, we have the courts to which we can go for protection. Should these fail us, we have then the right to petition Congress to repeal the law and should we again fail here, then we can ourselves right the wrong at the next election.*"

Does such language constitute "Espionage"? Most assuredly not. Nevertheless, the defendant got ten years for publishing the article.

From the time that the Selective Draft Act was passed and approved, until this Honorable Court handed down its opinion on January 7, 1918, in case of *Arver* v. *United States*, 245 U. S. 366, 38 Sup. Ct. Rep. 159, no living man knew whether or not the Selective Draft Act

was constitutional. It required the concurrence of at least four associate justices of this honorable court, in order that the opinion of Mr. Chief Justice White could become a law.

Several petitions to Congress were circulated, asking the repeal of the law. They failed.

On November 6th, 1918, we had an election. It is not necessary to state the result of that election. Everybody knows it. It is too plain for any argument that Wilson's administration did not receive the approval of the voters throughout the United States.

By reason of the premises aforesaid, we respectfully submit that the fifth count of said indictment does not state facts sufficient to constitute any offense against the laws of the United States, and that the District Court erred in overruling the demurrer thereto.

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VI.

The sixth count of the indictment fails to state any cause of action or any crime known to the Constitution and the Laws of the United States.

The sixth count, in the same language, charges the publication of a certain other statement, on August 17, 1917, as follows (print 41 to 43):

" 'Government contracts are profitable—goods you manufacture are now wanted by the government.'

This information appears in a letter sent out by the U. S. Legal Corporation from the Bond Bldg., Washington, D. C.

Profitable indeed, and paid for out of the sweat and blood of the American people.

That's why we are in the war.

'Loyalty to government is a noble quality when the government strives for the peace and happiness of its people, but when rulers scheme to use them for their own aggrandizement loyalty serves to perpetuate wrong.'

The Pittsburg Kansan makes the above remark in upbraiding the Germans for standing by the Kaiser. Now, will not the Kansan explain why its expression is not applicable to our own situation?

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

(a) THIS COUNT IS INSUFFICIENT AND IN VIOLATION OF ARTICLE SIX OF AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DOES NOT INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF ACCUSATION AGAINST HIM.

(See cases cited under the first count, *supra.*)

We respectfully submit that this article does not contain anything which could be construed as espionage. However, the defendant got ten years for having published the same.

By reason of the premises aforesaid, we respectfully submit that the sixth count of said indictment does not state facts sufficient to constitute any offense against the laws of the United States, and that the District Court erred in overruling the demurrer thereto.

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VII.

The seventh count of the indictment fails to state any cause of action or any crime known to the Constitution and the Laws of the United States.

This count was predicated upon the publication in the Missouri Staats-Zeitung, on August 24, 1917, of a Macon, Missouri, G. A. R. War Resolution, signed by Charles P. Hess, Commander (Print 44). The jury found the defendant not guilty as charged in this count (Print 91). We are informed that it was a directed verdict, although the transcript does not show it.

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VIII.

The eighth count of the indictment fails to state any cause of action or any crime known to the Constitution and the Laws of the United States.

The eighth count, in the same language, charges the publication of a certain other statement, on August 31, 1917, as follows (Print 45 to 47):

"We have hardly started with the building of an American merchants' fleet and already the British are reaching out their greedy hands for it. The Inter-Allied Chartering Committee of London has made the impertinent request upon the Federal Shipping Board, to place all American merchant ships, including those which are yet to be built, under its control.

In discussing the matter, several papers (the Northcliff Press, of course, suppresses all information upon

the question) express the hope that this will not be done.

Vain hope, indeed.

After we had built the Panama Canal for 400 million dollars, Mr. Wilson solemnly promised to maintain the advantages secured thereby to American ships using the ditch. Now did he keep his promise? His first official act was to personally appear before Congress and request, on behalf of England, a repeal of the law exempting American ships from any toll, thereby placing English ships on an equality with our own, although the canal had not cost them a cent.

The sooner the public wakes up to the fact, that we are led and ruled by England, the better.

Then and only then will they understand why our sons are to be slaughtered in France, and why we have thrown the Monroe Doctrine into the scrap pile, and embarked upon a world's policy.

A world's policy, not for our own benefit, but to help England in holding and in extending her world dominion.

Then and only then, when this situation is once thoroughly comprehended by the American people, when they once realize that their sons, their taxes and their sacrifices are only in the interest of England, will a return to a really sovereign and independent America be possible.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

(a) THIS COUNT IS INSUFFICIENT AND IN VIOLATION OF ARTICLE SIX OF AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DOES NOT INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF ACCUSATION AGAINST HIM.

(See cases cited under the first count, *supra.*)

This is nothing more or less than an attack upon England, and the action of President Wilson, and does not constitute "espionage." Every American knows, and England admits it, that had we not come to the rescue of the Allies, they would have lost the war. The President, as previously stated, does not construe the Espionage Act as being any restriction upon the right of criticism of him and his policies. Nevertheless, the defendant got ten years for publishing the article.

By reason of the premises aforesaid, we respectfully submit that the eighth count of said indictment does not state facts sufficient to constitute any offense against the laws of the United States, and that the District Court erred in overruling the demurrer thereto.

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IX.

The ninth count of the indictment fails to state any cause of action or any crime known to the Constitution and the Laws of the United States.

The ninth count, in the same language, charges the publication of a certain other article, on September 21, 1917, as follows (Print 47 to 49):

"Dr. William T. Fitzsimmons of this city is not the first name on the casualty list of the American army in France, as Mr. Roosevelt puts it in a local evening paper. The records in Washington show that the first name on this list is that of a young soldier from New York City of German parentage by the name of Burghardt.

Nevertheless, we grieve as sincerely and as deeply with this community over the loss of the doctor as we do over the loss of young Burghardt and his widowed mother in far-off New York.

God knows that the Staats-Zeitung has done everything within its power to spare these two mothers their terrible bereavement.

It is inconceivable to the human mind how a nation like ours, removed from the terrible holocaust in Europe by three thousand miles of water, could possibly become involved in that awful carnage, when nations like Switzerland and Holland, situated in the very midst of the conflagration, have managed to keep out. It stands to reason that if, under the terrible stress of warfare, there did occur violations of international laws and infringements of neutral rights they certainly would have happened more frequently, more annoyingly and with greater persistency close to the battle lines than thousands of miles away.

Surely we had far better opportunity to keep away from the danger than had these two nations just mentioned. But we have forsaken the counsel and the ways

of our revolutionary fathers, thrown the Monroe Doctrine on the scrap pile and entered upon a world policy.

The two young men whose untimely death we now mourn, are the first sacrifices we are bringing this new venture into untried spheres? Hundreds, thousands, yes, even millions of just such promising young lives may follow—will undoubtedly follow—unless the death of Burghardt and Fitzsimmons arouses in the national conscience the query: 'Is it worth the price'?

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

(a) THIS COUNT IS INSUFFICIENT AND IN VIOLATION OF ARTICLE SIX OF AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DOES NOT INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF ACCUSATION AGAINST HIM.

(See cases cited under the first count, *supra.*)

This article expresses the regret that two of our boys should have lost their lives for what the author believed to be an unjustifiable cause. It predicts that hundreds, thousands and even millions of such promising young men as Doctor Fitzsimmons and Mr. Burghardt will lay down their lives on the field of battle. That proved to be true. The article attacks the administration for having declared war, but that is not espionage. Nevertheless, the defendant got ten years for publishing the article.

By reason of the premises aforesaid, we respectfully submit that the ninth count of the indictment does not state facts sufficient to constitute any offense against the laws of the United States, and that the District Court erred in overruling the demurrer thereto.

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X.

The tenth count of the indictment fails to state any cause of action or any crime known to the Constitution and the Laws of the United States.

The tenth count, in the same language, charges the publication of a certain other statement, on September 28, 1917, as follows (Print 49 to 51):

"France insists that it will agree to no ending of the war unless the German provinces of Alsace and Lorraine are ceded to France, and England proposes to deprive Germany of all her colonies in Africa. In order that they may remain in undisputed possession of this booty, German militarism is to be destroyed in addition. And for this high purpose of the war, America is being militarized and we are being chided because we are not enthusing at the prospect.

Of course, it was highly praiseworthy for Lord Northcliffe and other Englishmen to spend many hundreds of thousands of dollars in this country to drag us into the war on the side of the Allies, but it certainly is looked upon as a heinous crime for Count Bernstorff to have expended a few thousand dollars for the purpose

of maintaining peaceful relations between Germany and the United States, judging by the condemnation voiced forth against him in the majority of the big English dailies in the cities. Where are we at, anyway?

Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America."

(a) THIS COUNT IS INSUFFICIENT AND IN VIOLATION OF ARTICLE SIX OF AMENDMENTS TO THE CONSTITUTION OF THE UNITD STATES IN THAT IT DOES NOT INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF ACCUSATION AGAINST HIM.

(See cases cited under the first count, *supra.*)

This is another attack upon England. Indirectly, it is also an attack upon the present administration. Neither of them constitute espionage. Nevertheless, the defendant got ten years in the penitentiary for having published the same.

By reason of the premises aforesaid, we respectfully submit that the tenth count of said indictment does not state facts sufficient to constitute any offense against the laws of the United States, and that the District Court erred in overruling the demurrer thereto.

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XI.

The eleventh count of the indictment fails to state any cause of action or any crime known to the Constitution and the Laws of the United States.

The tenth count, in the same language, charges the publication of a certain other statement, on October 5, 1917, as follows (Print 51 to 55):

The Truth in a Nutshell.
By Joseph D. Shewalter.

"It is an unfortunate trait in men that those questions which by their importance, call most urgently for calm deliberation, excite those passions which make calm deliberation impossible. And as Republics are composed of an aggregation of men, the defects of the individual are intensified in multitudes. It is to this trait we must look for the failure of Republics, and that men have been doomed to live under despotism.

There is another trait. Those mentally unbalanced, take up intense hatred to their best and dearest friends. It is so in Republics. For instance, today the English press and the Syndicate-owned press in the United States are eloquent in the denunciation of George III (born in England as was his father, but whom they tell us was a German), and all of his supporters.

The patriots of that day, they tell us, were Pitt, Camden, Rockingham, Fox, Burke and all the Whig leaders. Yet they were denounced at that time as rebels and traitors, and the same class who now denounce them, now denounce the very men who uphold their principles.

I would like to appeal to the common sense and patriotism of the American people.

Israel received a form of civil government from heaven. They were happy and prosperous. At last, through sin and their own conduct, they brought misfortune upon themselves. They blindly refused to trace these to their true cause, and correct their own conduct and errors. They attributed their troubles to their constitution and form of government.

Does not every one know this is our precise condition? They asked Samuel for a King that they might become like other nations. Samuel protested. I expect he was called a "rebel," "traitor," and other endearing names by the idiots of that day.

He told them that under a kind, "like other nations," he would take their "young men for war," and take their substance for the same purpose. That under these oppressions they would finally cry out, "and the Lord will not hear you in that day." The voices of those who plead for the old order, the old constitution and the old liberty, was drowned by the voice of the multitude.

I ask earnestly, if the history of Israel is not our precise history? What has this war already cost us? It has cost us our constitution and our liberty. It is to cost us at the start a million and a half of our young men, "taken for war." Of our substance it is to take the first year thirty billions of dollars. How much money is that? It would stagger the imagination, if even the imagination could grasp it. It is in a few words, a sum

which exceeds all the amounts paid out by the United States for all purposes of war and peace, from July 4, 1776, to the commencement of Mr. Wilson's first term. All the expenses of a hundred and thirty-seven years, is now crowded into one. Taft, we are told, was extravagant, yet the expenses of this one year would pay sixty years of Taft's extravagant administration.

But what are these European nations fighting for? Does anyone know? Perhaps they are, as said by Jefferson, "but nations of eternal war." But, if sanity prevails, I think, I can tell what it is all about.

England has become the commercial nation of the world. Her commerce commanded the sea. All our exports and imports were carried in her vessels. Our industries were confined to agriculture, to mining and to manufacturing. The first two were taxed for the direct benefit of the last. Out of this system directly grew those monsters known as trusts. Under the tariff of 1847 and 1857 our carrying trade sprang into existence and became the greatest in the world, surpassing England. Had not the Civil War come, war would have come with England three years ago. But the Civil War, and the great protective tariff, which has since prevailed, completely destroyed our carrying trade.

We talk about our rights on the sea, we have no commercial vessels on the sea. We built a canal, but we have no vessels to pass through it except vessels of war and coasting vessels.

In 1871, under Bismarck, the German confederation was formed. It was the most enlightened, freest and

best government in Europe, except Switzerland, which must always be excepted from all comparisons. This fact as to the government of Germany is notorious, and is proved in detail by Prof. Woodrow Wilson's works.

Whatever we may think of Germany, at present, her people are among the most intelligent and energetic in the world. Where this is the case, under free institutions, the people must be prosperous, and they present that happy condition, where wealth is diffused among the people. Conditions are proved by this further fact that this little confederation is defending its country from invasion, as no other people has ever defended its native land. Whatever we believe in the United States, or made to believe, through the suppression of truth and the printing of falsehoods, the German people themselves, believe they are defending their homes and their liberties.

Germany determined to reach out and become a rival of England for the sea trade. England determined to have no rival, as she has determined for centuries past. To that she alone, of the European nations, rejected the rules of 'International Law,' known as 'The Great American Doctrine,' as laid down by Jefferson. In their place she laid down certain rules, called 'Orders in Council,' and rules of her prize courts. These rejected the rights of every other nation, and made them subservient to her.

England easily engaged France because of old animosities. She easily controlled Russia; yet in passing I will say she never spoke a word in behalf of the down-

trodden people, when a word from her would have abolished Siberia and Russian despotism.

And so war came in order to suppress and conquer Germany, and to prevent her from becoming a rival on the sea. God knows this is the truth and history will record it.

And all this loss of lives and the grinding taxes on the American people are to perpetuate the sea monopoly of England—which has never had a rival, except by the United States, for about ten years before the Civil War.

Well, how did the United States get into it? These great trusts had controlled one political party completely, and it sought and captured the other completely in 1912. Bryan did it, intentionally or unintentionally, at Baltimore; and these interests made Roosevelt run to complete the victory in the general election.

War came in Europe, and for the first time in our history (with one exception) the wealth of these great trusts was turned to supplying the armies of the Allies with all they needed. The administration did all it could to facilitate this illegal and contraband trade, on both land and sea. Mr. Taft says: 'We observed strict neutrality.'

He thus admits that such a thing as 'neutrality' exists in law. But if certain nations—England and France—can raise armies, equip, maintain and make effective these armies, and is yet a 'neutral,' then no such thing as neutrality exists or can exist in reason or law.

And finally these great interests demanded war for three reasons: First, the Allies were exhausted finan-

cially and were unable to buy and pay for more munitions. Second, they were uneasy about the debt owed them, and wished the United States to advance the money to these foreign nations to pay for the munitions they had already bought. Third, they wished an enormous debt created, which would be owed to them and grind the people down for hundreds of years. They wanted a great creditor class to own and collect the substance of the toilers.

This made a large standing army both profitable and necessary. This last has come, and in my opinion, the Empire is enthroned.

They say the constitution is suspended for war. The empire is then enthroned for the war at least, and where did an empire once enthroned ever voluntarily relinquish its power?

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

THIS COUNT IS INSUFFICIENT AND IN VIOLATION OF ARTICLE SIX OF AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DOES NOT INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM.

(See cases cited under the first count, *supra*.)

This article was also written by Joseph D. Shewalter, the attorney who represented the defendant in the District Court. The defendant is not an attorney. Mr. Shewalter, however, received the degree of Bachelor

of Laws in the University of Virginia in 1868. So far as we are informed, he has practiced law ever since. For a number of years past, he has lived at Independence, Missouri. At one time he was a candidate for the office of United States senator of Missouri. The Constitution of the United States has been his special study. It would be only natural that the defendant would rely upon Mr. Shewalter's judgment, that the article could be published, without violating the law. Hence, we are unable to see how the publication could be with a criminal intent. Mr. Shewalter would surely not have written, and caused the publication of the article aforesaid, had he known that it would cause his client to serve ten years in the penitentiary. The article surely does not constitute Espionage.

By reason of the premises aforesaid, we respectfully submit that the eleventh count of said indictment does not state facts sufficient to constitute any offense against the laws of the United States, and that the District Court erred in overruling the demurrer thereto.

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XII.

The twelfth count of the indictment fails to state any cause of action or any crime known to the Constitution and the Laws of the United States.

The twelfth count, in the same language, charges the publication of a certain other statement, on November 30, 1917, as follows (Print 55 to 57):

"The next move will be on our part, that is on the part of the Allies. Remember we must give answer, not only to the Central Powers but to Russia as well. That great, though badly disorganized nation we find on the side of the Central Powers now. It is with this condition our statesmen will have to reckon. The situation has already changed and it will require the utmost mental keenness and discreet planning on the part of our diplomats to secure for us an honorable peace.

German staff officers are now reported to be in Petersburg.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

(a) THIS COUNT IS INSUFFICIENT AND IN VIOLATION OF ARTICLE SIX OF AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DOES NOT INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF ACCUSATION AGAINST HIM.

(See cases under the first count, *supra*.)

We are unable to see how this article can be construed to be Espionage. Nevertheless the defendant got ten years for publishing the same.

By reason of the premises aforesaid, we respectfully submit that the twelfth count of the indictment does not state facts sufficient to constitute any offense against the laws of the United States, and that the District Court erred in overruling the demurrer thereto.

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As far as the American is concerned this language is absolutely beyond his comprehension. What concern should it be to him to emancipate the Germans, whom he is supposed to be fighting, from any fear? Who can say when that thing the President calls "fear" has been subdued and the emancipation accomplished? As to emancipating the American from any such fear, the President speaks of, why there is not an American citizen who knows of harboring such a fear. Upon this score Mr. Wilson's mind can be quickly set at rest. The American people feel absolutely and positively no fear of the United States ever being conquered by any power aspiring to wars world's empire.

The message shows, that while he declines to again discuss the causes of our war, he goes into great detail regarding the great wrongs committed by Germany against other nations, matters already under discussion for the last three years. And the American is again forced to ask what concerns are these wrongs to the United States? We certainly cannot be expected to go about the world fighting to right all the wrongs that are being done. And how do we know they are wrongs? Mr. Wilson may think they are, and other people may differ with him quite decidedly upon that question, the same as they do differ with him regarding as to who is to blame for the European war. He thinks Germany dominates Austria; many others and just as well informed people, think England dominates France, Italy, and up to a few weeks ago, Russia. Who is right?

But what does all of this concern us as Americans? Let them have their feuds, fights and wars over there for all any Americans should care about. What we are concerned in is the question, when will our grievances with Germany be considered righted and when can the American people expect peace? To this question Mr. Wilson has given no answer in his message—but instead—has urged that the war be extended to Austria-Hungary, for no other reason than that it is an ally of Germany. We therefore repeat, his message may bring cheer to England, France and Italy. It brings none to the American people.

William Bross Lloyd, one of the owners of the Chicago Tribune, from his office in the Tribune Building, issued an open letter to Clarence Darrow, a copy of which he sent to the Chicago Examiner with the request that it be published.

It was issued on the occasion of the announcement that Mr. Darrow would speak at Medinah Temple on the subject, "Why We Are At War."

The letter bears Mr. Lloyd's signature. Upon its receipt a representative of the Examiner called Mr. Lloyd by telephone and asked him if he had written it and if he desired that it be printed. He said he had written it and he did want it printed.

The letter in full follows:

"Mr. Clarence S. Darrow, 140 North Dearborn Street, City.

Dear Sir: I see you are to speak tonight on "Why We Are At War." Possibly you can do me a service.

I am bitterly against this war.

I think our entrance into it was the most monstrous treachery to the people of the United States that has ever happened. I don't care at all about hindering the conduct of this war. I want to stop it here and now, immediately if not sooner.

"I feel as I do because I feel we were plunged into it, betrayed into it by officials knowingly acting against the people's will; because I feel our going to war to be absolutely of no benefit to the people of the United States; because I feel, on the contrary, that it is and will be of vital detriment to every interest of the people.

"I very clearly differentiate between patriotism to the people of the United States and patriotism to big business and the administration of the United States government which has served and is serving its interests. And yet it is a very bitter thing to me not to be able to climb on the band wagon and listen to the lovely siren music of our so-called patriotism. Possibly you can help me see the light.

"In my stand I feel I am representing the interests of the working class, and in a country where wealth is so concentrated as ours, that is the same as the people. In a country, where as your friend Frank Walsh, shows, nine out of ten working men get less than $20 per week, where 70 per cent get less than $15, where half the working women get less than $6, the workers are the people.

"Now discarding all altruistic crusading idealism (*i. e.* not attending to our business but making the world safe for democracy) and moral platitudes and honorable

pretenses, tell me how in any concrete way the life and living conditions of nine people out of ten will be bettered during the war or after it.

"Will their wages be higher, will their wages buy more; will they be better clothed, housed, fed, educated; will they have more and better recreations? Will employment be more secure, their livelihood more certain? Will they be freer of the haunting specter of unemployment, incapacity due to age, disease or accident, the worry that kills and crazes?

"Will they have a better chance to live, to love, to rear a family—in short, to do the simple, fundamental things that really make up life and make it worth living?

"Of course, I realize that if the Kaiser conquers this country they will lose the chance to vote for a president who kept us out of war only to plunge us in without any consultation of the people. But if we are conquered wouldn't the Kaiser do that for us just as well? Also we lose a lot of rights like the right to throw ashes or garbage in our alleys and to do lot of unhygenic things like that? But wouldn't that be better for us? Tell me and be specific and concrete. Maybe you can convince me.

"It has been reported to me that you have said: 'When the war is over I will back in the radical movement.' Yes? One of my greatest sources of amusement lately has been the spectacle of a Tolstoyan non-resistant shouting for war and a philosophic anarchist supporting a Government that wages it. These are times of stress that show what men really are.

"I want to repeat to you what a prominent Socialist said to the United States district attorney of the district in which he lived: You will want to live in ..... after the war is over. Don't forget to live and act during the war so that you can live here after it.

Yours very truly,

"WILLIAM BROSS LLOYD."

War Reports.

This has been a rather eventful week in the world's history. The most important, no doubt, is the completion of an armistice between Russia and the Central Powers, and probably the entering upon peace negotiations. The Russian government remains in the hands of the Bolsheviki's. It is reported that German and Austrian war prisoners in Russia will be released in a few days.

Russia seems to be on the verge of absolute dissolution. Siberia wants a separate government, with the capital at Omsk. Next in order is Crimea, with the seat of power at Sebastopol. Then follows the Ukrainia with the capital at Kiev. Fourth is Kuban in Caucasus, and fifth, Finland with Helsingfors.

On Friday, the 28th of November, began in Paris a meeting of all the allied powers. Russia was represented and so were the United States by Col. House. It is significant, however, that the United States representative withdrew early from the gathering. This may substantiate those stories which emanated from Washington to the effect that Col. House had definite instructions from President Wilson to inform the Allies that unless they

could agree upon united action, the United States would withdraw from the conflict. It is very likely that Col. House delivered this message and immediately withdrew from the meeting. His non-participation in the deliberations may on the other hand have been for the reason that we do not stand pledged to refrain from entering upon a separate peace.

On Saturday the German Reichskanzier, Dr. Count Von Hertling informed the Reichstag that Germany was ready to enter upon negotiations for peace with Russia. Regarding Poland, Lithuania and Kurland he said "We shall respect their right for self determination." He then recounted the achievements of the armies of the Central Powers which, he claims, have been successful in almost every undertaking. Our enemies, Count Hertling continued, pretent to fight against German militarism which, so they say, is destructive to the world's peace. Why, he asked, did the Italian premier, Sonnino, in his speech on August 28, brush aside the idea of a general disarmament as puerile? Clemenceau of France plainly stated it to be the object of the Allies, even after the close of the war, to exclude the Central Powers from any communication with other nations. Lloyd George had officially declared the war aim of the Allies to be the destruction of Germany's commerce, and that the war must be continued until this goal had been reached. In fact, the deception of Germany being the destroyer of the World's peace, said the Count, has now been completely unmasked and shown up

by the secret correspondence found in Petersburg and now being published by the Russian government.

The Central Powers are carrying on a defensive war, as they have from the very beginning. They have succeeded in keeping the enemies from the soil of the fatherland and will do so in the future. The Central Powers are not responsible for the continuation of the war, and will insist upon the consequence of the butchery and destruction of property being borne by those responsible for it—the Allies.

A new war credit of 15 million marks was voted without opposition.

At the West front around Cambrai there have been strong German attacks made, which it is admitted, have pierced the British lines at least several points. The meager reports coming to us from there would indicate that all is not as well as it might be. American soldiers, too, are reported to have been among the more than six thousand British troops captured. It is also reported that a great many British guns have been captured. It is not clear whether or not the Germans only attempted to drive General Haig back from the territory recently captured or whether a serious attempt is contemplated to break through the British lines and repeat the tactics so successfully carried out at the Izonzo front against Italy. Not much news is available from the Piave front.

Lord Lansdown has created a great stir in England through the publication of a letter in which he openly advocates the entering upon peace negotiations on the part of the Allies. English diplomats say this may force

England to enter upon negotiations upon the basis of a defeated nation.

With Russia determined for peace England cannot long delay entertaining Lord Lansdowne's proposal.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

ELMER B. SILVERS,
Assistant United States Attorney.

(a) THIS COUNT IS INSUFFICIENT AND IN VIOLATION OF ARTICLE SIX OF AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DOES NOT INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM.

(See cases cited under the first count, *supra.*)

We respectfully submit that nothing contained in the foregoing article and letter, constitute Espionage. It condemns the President and his administration, but that does not constitute Espionage. Nevertheless, the defendant got ten years for publishing the same.

By reason of the premises aforesaid, we respectfully submit that the thirteenth count of said indictment does not state facts sufficient to constitute any offense against the laws of the United States, and that the District Court erred in overruling the demurrer thereto.

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XIII.

The thirteenth count of the indictment fails to state any cause of action or any crime known to the Constitution and the Laws of the United States.

The thirteenth count is in words and figures as follows, to-wit (Print 57 to 62, inclusive):

"Mr. Wilson's message may be joyfully received in England, France and Italy. But after the average American has read through the labyrinth of high-sounding sentences he comes to the conclusion that they contain not a word of either cheer or hope to him. For almost nine long months now he has borne great sacrifices for this war. He has given his boys, complied with the request for a meatless and wheatless day each week, subscribed twice to a liberty loan, contributed to the Red Cross, and numerous other funds, and worst of all, he has seen day by day the cost of living going up and almost getting beyond his reach.

He felt that it was due him to be remembered for all this in the president's message, his sacrifices recognized and some hope held out to him as to how the future of his beloved nation would be bettered and enriched by his efforts, and how soon he might expect it to be all over so he might resume the peaceful tenor of his ways.

Instead of finding all this set forth in a clear, concise and to him understandable manner, he reads in the message this:

'We are in fact fighting for their (the Germans') emancipation from fear, along with our own, from the fear as well as from the fact of unjust attack by neighbors or rivals or schemers after world empire.'"

XIV.

The District Court erred in overruling the demurrer to each count of the indictment.

(See Demurrer, print 73 to 76, inclusive.)

(a) THAT THE INDICTMENT, AND EACH COUNT THEREOF, FAILS TO STATE ANY CAUSE OF ACTION OR ANY CRIME KNOWN TO THE CONSTITUTION AND LAWS OF THE UNITED STATES.

(b) THAT SAID INDICTMENT AND EACH COUNT THEREOF, ARE INSUFFICIENT AND IN VIOLATION OF ARTICLE SIX OF AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN THAT THEY DO NOT INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF ACCUSATION AGAINST HIM.

(c) THAT THE MATTERS CHARGED IN THE DIFFERENT COUNTS OF THE INDICTMENT CANNOT, UNDER THE CONSTITUTION, BE MADE PENAL.

(d) THE POWER TO ABRIDGE THE FREEDOM OF SPEECH AND OF THE PRESS COMES WITHIN THE POLICE POWERS OF THE STATES.

(See citations and authorities cited under the first count of the indictment.)

The "Espionage Act" of June 15, 1917, purports by its title and headings to be an act against spies and spying; that is secret acts against the Government and its military and naval service, while in a state of war. The act contains nine general sections and all come with-

in the general purview of the title and heading of the act, except Sections 3 and 4 under which this indictment purports to have been drawn. These two sections relate to "Seditions and Disloyal Acts, UTTERANCES AND STATEMENTS," the turpitude of which is based upon their publicity, and not upon their secret nature. The result is the injection into the body of the act against the abhorrent crimes of espionage, a "Sedition Law," which relates to acts of the exactly opposite nature to those relating to spies and spying; and this "Sedition Law" is of that character which the people of these United States have so jealously watched and antagonized since the Constitution was offered for adoption.

Was it necessary to hide this "Sedition Law" away in the body of this purported Espionage enactment in order to secure its passage? It certainly violates the rule that nothing shall be contained in an act of legislation which is not clearly designated in the title and headings. Sections 3, 4 and 5 of the Act, all relating to Sedition, can be wholly eliminated from the Act, and the remaining sections would remain in full force and effect.

The inherently despicable crimes of Espionage are not of a nature to involve the rights of free speech, and of a free press; nor of the liberty of opinion and the public expression thereof regarding public measures, policies and officials.

The mind of the patriotic citizen naturally revolts at the person and work of the spy against the Government, but, at the same time, might be in sympathy with public criticism of the governmental measures involved.

Any law against sedition must naturally partake of the nature of the law against treason; in fact, sedition, while it may not come within the definition of specific treason by the provision of the Constitution of the United States, yet is constructive treason in its very nature, against the policy of recognizing and establishing which the people of the United States heretofore have been so guarded. It is the usual form by which oppression and tyranny have crept in upon the people in past ages and past governments.

If these sections of this act do not create a new form of treason unwarranted by the Constitution, nor come within the purview of constructive treason, which is not recognized by the United States, the only other class of public offenses in which it may be placed is that of resistance to the execution of certain specific laws of the United States, a necessary element of which is force.

This condition is recognized in the indictment in the case of *The United States* v. *William D. Haywood et al.*, in the United States District Court at Chicago. If the indictment in that case, as related to the Espionage Act of June 15, 1917, is good, the indictment in the case at bar is not good in any one of its thirteen counts in that it fails to allege and specify the use of force by the defendant to prevent, hinder and delay the execution of certain laws of the United States, to-wit: The Act of Congress, approved June 15, 1917, and entitled "An Act to Punish," etc.

We respectfully submit that the demurrer to the indictment should have been sustained.

XVI.

The District Court erred in overruling the demurrer to the evidence.

At the close of the Government's evidence, the defendant interposed a demurrer to such evidence, and asked that the court give a peremptory instruction to find the defendant not guilty, which demurrer and request were overruled and denied, to which action of the court the defendant then and there duly excepted (Print 87).

July 1, 1918, at the time that the Writ of Error was issued, the District Court made an order granting the defendant leave to file a bill of exceptions on or before September 1, 1918.

August 7, 1918, Joseph D. Shewalter, transmitted to Francis M. Wilson, United States Attorney, for his approval, a proposed bill of exceptions, according to Rule 4 of this Honorable Court, which the said United States Attorney refused to consider or approve.

August 20, 1918, said Joseph D. Shewalter transmitted to the Honorable FRANK A. YOUMANS, Judge by assignment as aforesaid, said proposed bill of exceptions, which the said judge refused to approve, and that in lieu of said proposed bill of exceptions, the said judge prepared, signed and sealed another pretended bill of exceptions, for the alleged reasons "For as much as the matters herein set out do not appear of record in this cause, and because the bill of exceptions prepared and tendered by the defendant is incorrect, incomplete and not susceptible of amendment, this bill of exceptions is prepared, signed and sealed by the court and upon the

request of defendant is made a part of the record herein," but that in the said bill of exceptions, so sealed as aforesaid, the only reference to the actual trial, and evidence introduced are the following, to-wit:

"Thereupon a jury was called and duly sworn and empaneled to try the case of the United States against Jacob Frohwerk.

On the trial of said cause the United States introduced testimony tending to prove all of the allegations in counts 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12 *and* 13 *of the indictment.*"

With all due respect to the learned jurist who presided at the trial of this cause, if the foregoing statement is sufficient to constitute a bill of exceptions, as to the evidence introduced on the part of the Government, when its sufficiency is challenged by a demurrer, we have heretofore gone to a useless expense in getting up, signing and sealing bills of exceptions. The bill of exceptions does not even say that the evidence introduced was sufficient to support a verdict, but simply that the United States introduced testimony *tending* to prove all of the allegations in counts 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12 and 13 of the indictment. The bill of exceptions did contain the instructions given and refused, and all objections and exceptions to the same. Mr. Shewalter, however, refused to accept the bill of exceptions, and the same has never been filed and made a part of the record in this case. Consequently, the defendant is prevented from having the sufficiency of the evidence, and the instructions given and refused, examined by this Honorable Court.

Had the bill of exceptions been filed, the defendant would have at least been entitled to have the instructions given and refused reviewed by this Honorable Court.

Not being a member of the Bar of this Honorable Court, Mr. Shewalter prepared suggestions against advancing the court for hearing, which were signed and filed by Mr. Frohwerk in person, in which he stated in part:

"It is now his purpose, so soon as he can gain the means, to apply to this court for a mandamus, compelling the judge to sign a true bill of exceptions, made in accordance with the wise and humane rules of this court. And the judge living elsewhere, all contest over the bill of exceptions was by correspondence, and on the application aforesaid, he will submit to this honorable court, a printed copy of all this correspondence, accompanied by the original letters of the judge, and the carbon copies of his counsel's letters, sent to the judge. They will show the exact status. Therefore, the plaintiff in error, respectfully insists that in this condition of the record, a hearing should not be ordered; while at the same time he is anxious that his case should be heard before a decision of the question in other cases—if those cases involve, as stated in the motion, the same questions.

The cause was nevertheless set down for argument on January 6, 1919.

December 9, 1918, the defendant, represented by his present attorney, a duly admitted, licensed and practicing attorney and counsellor of this honorable court, presented

to this honorable court, the defendant's motion for leave to file a petition for a writ of mandamus against the Honorable FRANK A. YOUMANS, judge, to compel him to prepare, settle and seal a proper bill of exceptions, which motion was on December 16, 1918, denied by this honorable court.

Mr. Shewalter, who had in the meantime prepared and caused to be printed, at the expense of about $140.00, a brief for plaintiff in error, which brief was not nearly completed.

January 18, 1918, upon ascertaining that the defendant had actually employed an attorney, admitted to practice in this honorable court, and had actually presented a motion for leave to file a petition for a writ of mandamus, in accordance with the aforesaid suggestions, felt his dignity so outraged, that he had a "brainstorm," and commences an action for injunction, in the Circuit Court of Jackson County, Missouri, at Independence, and procured, *ex parte*, from the Honorable W. P. HALL, judge of said court, a restraining order, in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, at Independence. Joseph D. Shewalter, Plaintiff, vs. Jacob Frohwerk, and John A. Riley, Defendants. No. 36431.

Restraining Order.

The application for temporary injunction herein is set for hearing for Saturday, December 28th, 1918, at the hour of 11:00 o'clock A. M.

In the meantime, and until the further order of this court, upon plaintiff giving a bond in the usual form, in the sum of One Hundred ($100.00) Dollars, signed by Olney Burrus as surety, in favor of defendants, and after due consideration of the petition on file herein, defendant, Jacob Frohwerk, and his agents, servants or others acting with or for him, is enjoined and restrained from interfering with plaintiff's manuscripts, proof sheets, or briefs in the case of Jacob Frohwerk, Plaintiff in Error vs. the United States of America, the defendant in error, in the Supreme Court of the United States, or receiving or taking them into his or their possession, and that defendant, John A. Riley, from delivering any of said briefs or proof sheets or copies of said briefs or manuscript of said briefs to the said Jacob Frohwerk, or his agents, servants, employes, or others acting in concert with or for him, or anyone else other than the plaintiff herein. Provided, however, that nothing in this restraining order shall interfere with the said John A. Riley in completing the printing of said brief, and delivering the completed brief in the number required by the rules of the Supreme Court of the United States to plaintiff, or anyone authorized by plaintiff in writing to receive said briefs for the purpose of filing the same in the Supreme Court of the United States.

JAMES B. SHOEMAKER, *Clerk.*

(Seal) By GEO. DONELLEN, *D. C.*

December 28, 1918, the said restraining order was made perpetual and final.

Through courtesy of the solicitor general, the hearing of this cause has been re-set for January 27th, 1919.

Upon making the said restraining order perpetual, the defendant retained his present attorney, to prepare, serve and file this brief, and to argue said cause before this Honorable Court.

During the limited time that we have had to prepare this Brief, from December 28, 1918, we have endeavored to examine the authorities carefully and are of the opinion that the judgment of the District Court should be reversed.

Respectfully submitted,

FRANS E. LINDQUIST,
Attorney for Plaintiff in Error.

GEO. N. ELLIOTT, *Of Counsel.*

Kansas City, Missouri, January 11, 1919.